

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MISSOURI
3 EASTERN DIVISION

4 TRADITIONALIST AMERICAN KNIGHTS
5 OF THE KU KLUX KLAN, et al.,

6 Plaintiffs,

7 vs. Cause No. 4:13CV810 NAB

8 CITY OF DESOLOGE, MISSOURI,

9 Defendant.

10 =====
11 TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING

12 BEFORE THE HONORABLE NANNETTE A. BAKER
13 UNITED STATES MAGISTRATE JUDGE

14 SEPTEMBER 11, 2013
15 =====

16 APPEARANCES ON THE NEXT PAGE
17
18
19

20 Transcribed by:

21 Alison M. Garagnani, CCR #475, CSR, RMR
22 Official Court Reporter
23 United States District Court
24 555 Independence, Room 3100
25 Cape Girardeau, MO 63703
(573) 331-8832

Proceedings Recorded by Electronic Recording

APPEARANCES

For Plaintiffs:

MR. ANTHONY E. ROTHERT
MR. GRANT R. DOTY
American Civil Liberties Union of
Eastern Missouri
454 Whittier Street
St. Louis, MO 63108

For Defendant:

MR. JOHN YOUNG, JR.
MR. NEAL B. GRIFFIN
Stinson and Morrison
7700 Forsyth Boulevard
Suite 1100
St. Louis, MO 63105

And

JOSEPH L. GOFF, SR.
Reeves and Goff, P.C.
550 Maple Valley Drive
P.O. Box 189
Farmington, MO 63640

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

Page

September 11, 2013

FRANK ANCONA:

DIRECT EXAMINATION BY MR. ROTHERT	8
CROSS-EXAMINATION BY MR. YOUNG	23
REDIRECT EXAMINATION BY MR. ROTHERT	55

GREGORY CAMP:

DIRECT EXAMINATION BY MR. YOUNG	69
CROSS-EXAMINATION BY MR. ROTHERT	95

SEAN RONEY:

DIRECT EXAMINATION BY MR. YOUNG	122
CROSS-EXAMINATION BY MR. ROTHERT	129

DAVID BRAMMEIER:

DIRECT EXAMINATION BY MR. YOUNG	132
CROSS-EXAMINATION BY MR. ROTHERT	167
REDIRECT EXAMINATION BY MR. YOUNG	187

Plaintiff's Argument	188
Defendant's Argument	204

EXHIBIT INDEX

Plaintiff's

<u>Exhibit</u>	<u>Description</u>	<u>Id</u>	<u>Rec'd</u>
A	Complaint	9	
B	Flyers	10	11
D	Letter	14	15
E	Ordinance	17	17
F	Photo	19	22
G	Photo	19	22
H	Photo	19	22
I	Photo	19	22
J	Photo	19	22
K	Photo	19	22
L	Photo	19	22
M	Photo	19	22
N	Photo	20	22
O	Photo	20	22
P	Photo	20	22
Q	Photo	20	23
R	Photo	20	23
S	Photo	20	23
T	Photo	20	23
U	Photo	20	23
V	Ordinance	56	56
W	Douma Affidavit	57	66
X	Burden Affidavit	57	66

Deft's

<u>Exhibit</u>	<u>Description</u>	<u>Id</u>	<u>Rec'd</u>
1	Ordinance	76	
2	Letter	79	80
3	Letter	80	81
4	Brammeier Report	140	141
5	Ordinance	46	86
6	Resolution	92	93
7	Adopting Ordinance	93	95

1 (THE PROCEEDINGS BEGAN AT 11:32
2 A.M.)

3 THE COURT: well, good morning.
4 Again, I do apologize for the late start. I did
5 not plan that we were going to have those
6 hearings this morning, but those things happen.
7 So I am sorry about that, but we are now here for
8 the case of Traditionalist American Knights of
9 the Ku Klux Klan versus City of Desologe,
10 Missouri.

11 And I want to let counsel know that
12 we are recording this. Everything is being
13 recorded through our -- it's called an FTR gold
14 system. So it's very important to speak into the
15 microphones, otherwise we cannot pick up what is
16 going on here. The microphone that's here,
17 obviously the witness microphone works, and the
18 microphone that's here at the -- in front of the
19 clerk works, and the one at the podium does. So
20 when you're questioning witnesses or making
21 argument, please step up to the podium to speak
22 into that microphone.

23 And at this time what I would like
24 is for counsel to announce your presence and who
25 you're representing so that we have that

1 information on the record, and you'll have to
2 step up to the podium to do that.

3 MR. ROTHERT: Your Honor, I'm
4 Anthony Rothert, and I'm here together with Grant
5 Doty, and we represent the Plaintiff in this case
6 who are the Traditionalist American Knights of
7 the Ku Klux Klan.

8 THE COURT: All right. Thank you.

9 MR. YOUNG: Good morning, Your
10 Honor. John Young on behalf of the City of
11 Desologe. Neal Griffin for the City of Desologe.
12 And Joe Goff, Sr. is here for the City of
13 Desologe as council member.

14 THE COURT: All right. Thank you.
15 well, we are here before the Court today because
16 the Plaintiffs are asking for a preliminary
17 injunction in this matter.

18 At this point you may begin
19 presenting your evidence.

20 MR. ROTHERT: As a preliminary
21 matter, Your Honor --

22 THE COURT: Yes.

23 MR. ROTHERT: -- we filed a motion
24 to exclude any witnesses from the courtroom.

25 THE COURT: You did, and I do recall

1 that, and I will go ahead and grant that motion.
2 so if there are witnesses that will be
3 testifying, there's a room out there that you can
4 use to wait until you're called.

5 MR. YOUNG: Your Honor, Mr. Greg
6 Camp is the city administrator of the City of
7 Desologe, and he'll be our representative --
8 party representative for the City of Desologe.

9 THE COURT: Okay. He'll be allowed
10 to remain. All right.

11 MR. YOUNG: All of our witnesses are
12 out here.

13 THE COURT: Okay.

14 MR. ROTHERT: Our first witness will
15 be Frank Ancona.

16 THE COURT: All right. You'll need
17 to step up here and be sworn in.

18 FRANK ANCONA,
19 being produced and sworn, testified as follows:

20 THE CLERK: Please state your name
21 and spell it for the record.

22 THE WITNESS: Frank Ancona.
23 A-n-c-o-n-a.

24 THE COURT: And you'll be seated
25 right up here.

1

2

3

DIRECT EXAMINATION

4

BY MR. ROTHERT:

5

Q. Mr. Ancona, it's going to be important
6 that you speak directly into the microphone.

7

A. Okay.

8

Q. Thank you. Could you state your name
9 for the record, please.

10

A. Frank Ancona.

11

MR. ROTHERT: If I have an exhibit,
12 may I approach the witness with it?

13

THE COURT: Oh, yes. Yes.
14 Absolutely.

15

MR. ROTHERT: And I have a binder of
16 all the exhibits for you to use for the Court.

17

THE COURT: All right. Sure. That
18 would be great. All right. Thank you.

19

MR. ROTHERT: And I have a copy to
20 give to opposing counsel.

21

THE COURT: I was going to ask to
22 make sure that also they have it.

23

MR. YOUNG: Your Honor --

24

THE COURT: Yes.

25

MR. YOUNG: -- while we're doing

1 that I can give you a binder of ours, and he can
2 do the same.

3 THE COURT: Oh, that's okay. I
4 mean, he's just letting me know. You have a
5 binder of your exhibits as well?

6 MR. YOUNG: We have a binder for the
7 Court, and then we'll do the same thing for
8 opposing counsel.

9 THE COURT: Okay. Great.

10 MR. ROTHERT: Okay. That's great.

11 THE COURT: Okay.

12 BY MR. ROTHERT:

13 Q. I've handed you what's been marked as
14 Plaintiff's Exhibit A. Is that the first amended
15 verified complaint that was filed on August 21st,
16 2013?

17 A. Yes, sir.

18 (PPlaintiff's Exhibit No. A,
19 Complaint, was identified.)

20 BY MR. ROTHERT:

21 Q. Did you review that complaint before it
22 was filed?

23 A. Yes, sir, I did.

24 Q. And when was the last time you reviewed
25 it?

1 A. This morning, sir.

2 Q. And are the facts alleged in that
3 complaint by you true?

4 A. Yes, sir, they are.

5 Q. Now, I've handed you what's been marked
6 and opposing counsel what's been marked as
7 Plaintiff's Exhibit B. Can you tell me how many
8 pages Exhibit B is?

9 A. Four pages, sir.

10 Q. All right. And what is Exhibit B?

11 A. These are informational flyers that our
12 organization hands out, distributes.

13 (Plaintiff's Exhibit No. B, Flyers,
14 was identified.)

15 BY MR. ROTHERT:

16 Q. And are those representative of the
17 handbills that you wanted to distribute in
18 Desologe?

19 A. Yes, sir, they are.

20 MR. ROTHERT: I move for admission
21 of Exhibit B.

22 THE COURT: Exhibit B?

23 MR. ROTHERT: Yes.

24 THE COURT: Is there any objection?

25 MR. YOUNG: No, objection, Your

1 Honor.

2 THE COURT: Okay. The Court will
3 admit Exhibit B. And I believe on here it's B1
4 through B4.

5 MR. ROTHERT: Yeah, I got it. B1,
6 B2, B3 and B4, yes.

7 THE COURT: Okay. Exhibit B will be
8 admitted into evidence.

9 (Plaintiff's Exhibit No. B, Flyers,
10 was received.)

11 BY MR. ROTHERT:

12 Q. Drawing your attention to October 2012,
13 during that month did you have occasion to
14 distribute handbills in the City of Desologe?

15 A. Yes. Yes, we did.

16 Q. Did anyone tell you that you had to
17 stop?

18 A. I believe so, yes. That was the day we
19 were told that we were in violation of an
20 ordinance.

21 Q. Okay. Who told you that you had to
22 stop?

23 A. I believe that was I think Cpl. Roney.

24 MR. YOUNG: Your Honor, I think this
25 is 2012 we're speaking about.

1 THE COURT: Yes.

2 MR. YOUNG: My objection is that the
3 2012 involves the initial ordinances, which was
4 the subject of the prior lawsuit. I don't think
5 it has any relevancy here in this particular case
6 since we're only involved in what I term the
7 initial ordinance and the amended ordinance.

8 That's already -- the incident and
9 that ordinance was already subject to Judge
10 Fleissig's decision, so I don't know why we need
11 to go into that today.

12 THE COURT: All right. What's your
13 response to that?

14 MR. ROTHERT: The relevance here is
15 what I would expect the testimony to say is that
16 Mr. Ancona and the other members were told that
17 they were soliciting and that soliciting -- that
18 handing out leaflets is soliciting.

19 And one of the issues as to -- the
20 Defendant has urged that we don't have standing
21 to challenge the provision of the ordinance as to
22 soliciting. So the fact that they've previously
23 called distributing leaflets soliciting together
24 with the fact that they haven't defined
25 soliciting it's our evidence to show that we

1 had -- that we have standing to challenge the
2 soliciting portion of the ordinance.

3 MR. YOUNG: Your Honor, that still
4 involves a time period and a different ordinance
5 that's already been determined to have been
6 defective, and it's been repealed. And the two
7 ordinances that are at issue under the verified
8 complaint that's Exhibit A are really what's at
9 issue here.

10 So I don't understand the point
11 that's been made and why it would be relevant in
12 this case. I'll renew the objection for
13 relevancy.

14 THE COURT: All right. If you're
15 just going to limit the questioning -- this is
16 not about -- about that particular ordinance,
17 although -- and I guess my concern is since the
18 enforcement that was going on was of the
19 ordinance that was in place at 2012, I am not
20 quite sure how that translates to whether their
21 distribution -- if they were to distribute now
22 under the current ordinance, whether -- how that
23 would mean that it would be soliciting -- you
24 know, what your case is -- you're making a case
25 whether it was distribution or soliciting.

1 So, you know what, I'm going to go
2 ahead and sustain the objection with regard to
3 what happened in 2012.

4 MR. ROTHERT: Okay. I'd like to as
5 to one exhibit -- Exhibit D -- I'd like to make
6 an offer of proof if I could do that.

7 THE COURT: Yes. Okay.

8 BY MR. ROTHERT:

9 Q. I've handed you what's been marked --
10 what's been marked as Exhibit D, Plaintiff's
11 Exhibit D. Is that the letter your attorneys
12 gave you that they received from the City of
13 Desologe?

14 A. Yes, sir, it is.

15 (Patient's Exhibit No. D, Letter,
16 was identified.)

17 BY MR. ROTHERT:

18 Q. And even though it's dated October 30th,
19 2011, was that, in fact, in 2012 that that was
20 received?

21 A. Yes, sir, it was.

22 Q. And could you read that portion of the
23 letter. Just the sentence that says
24 solicitation.

25 A. Solicitation by definition applies to

1 activities other than selling and includes the
2 activity which your client described to Mr. Camp.

3 MR. ROTHERT: So I would ask that
4 Exhibit D just for that limited purpose be
5 admitted.

6 MR. YOUNG: Your Honor, so that the
7 record is clear, I renew my objection to what was
8 the offer of proof.

9 THE COURT: Okay. Overruled. And I
10 will allow the admission of Exhibit D for that
11 limited purpose.

12 (Plaintiff's Exhibit No. D, Letter,
13 was Received.)

14 MR. ROTHERT: Okay.

15 BY MR. ROTHERT:

16 Q. Drawing your attention to April 26th,
17 2013, do you remember that date?

18 A. Yes, sir.

19 Q. Did you have occasion to go to Desologe,
20 Missouri on April 26th, 2013?

21 A. Yes, I did.

22 Q. What did you do in -- while you were
23 there in Desologe on April 26th?

24 A. I went with several other members, and
25 we began distributing the handbills, some of

1 which you have here in the exhibits. And within
2 minutes --

3 Q. Okay. Where did you -- where did you do
4 that in Desologe?

5 A. We did that, I believe, it's the corner
6 of Oak, and I can't remember the exact street
7 intersection, but Oak, and it's right in front of
8 the -- where the library and the post office is
9 in Desologe, Missouri.

10 Q. Okay. And can you describe what you
11 were doing. You said you were distributing
12 literature. How were you distributing it?

13 A. Well, we were standing on the sidewalk.
14 And as people would approach the stop sign if
15 they had their windows down, we would hold the
16 flyer up, and if they reached their hand out and
17 wanted a flyer, we would step off the sidewalk,
18 hand them the flyer and walk back to the sidewalk
19 again.

20 Q. And was that -- do you think that was at
21 the corner of Oak and Desologe Drive?

22 A. That was at the corner of Oak and
23 Desologe Drive, yes, sir.

24 Q. So did you stop at some point
25 distributing leaflets on April 26th, 2013?

1 A. We stopped when I was approached by a
2 police officer that said that we were in
3 violation of an ordinance. He gave me the
4 ordinance number. And I followed him into city
5 hall to get a copy of that ordinance.

6 Q. Do you remember -- do you know who the
7 police officer was?

8 A. I believe it was Cpl. Roney.

9 Q. And were you -- did he give you a copy
10 of an ordinance?

11 A. Yes, sir, he did.

12 Q. I've handed you what's been marked as
13 Plaintiff's Exhibit E. Is that the copy of the
14 ordinance that you were handed on April 26th,
15 2013 by Officer Roney?

16 A. Yes, sir, this is.

17 (PPlaintiff's Exhibit No. E,
18 Ordinance, was identified.)

19 MR. ROTHERT: I'd move for admission
20 of Exhibit E.

21 THE COURT: Any objection?

22 MR. YOUNG: No objection.

23 THE COURT: All right. Exhibit E
24 will be admitted.

25 (PPlaintiff's Exhibit No. E,

1 Ordinance, was received.)

2 BY MR. ROTHERT:

3 Q. Okay. Once you were given a copy of the
4 ordinance that's marked as Exhibit E, did it seem
5 to you that what you and the other members had
6 been doing was in violation of that ordinance?

7 A. Yes. I kind of scanned through it. But
8 having experience with this type of ordinance
9 before, I scanned through it, and I felt that,
10 yes, if we continued doing it, we would be in
11 violation of the ordinance, and, you know,
12 subjecting ourselves to arrest or prosecution.

13 Q. So what effect did this have on you, if
14 any?

15 A. I told all of our members that we needed
16 to leave immediately and cease handing out
17 flyers.

18 Q. Do you have any concern or fear that you
19 or other members of your organization will be
20 prosecuted for violating the ordinance for your
21 activities of April 26th, 2013?

22 A. Yes, I do. Because I was told that they
23 enforce all the laws and all the ordinances on
24 their books.

25 Q. And your understanding is that law was

1 on the books on April 26th?

2 A. Yes, sir. Once I was provided a copy of
3 this.

4 Q. I've handed you what's been marked and
5 we're giving a copy to opposing counsel of
6 Plaintiff's Exhibits F through U, a group of
7 photographs. Have you reviewed those photographs
8 before?

9 A. Yes, sir. I've reviewed them this
10 morning.

11 (Plaintiff's Exhibit No. F, Photo,
12 was identified.)

13 (Plaintiff's Exhibit No. G, Photo,
14 was identified.)

15 (Plaintiff's Exhibit No. H, Photo,
16 was identified.)

17 (Plaintiff's Exhibit No. I, Photo,
18 was identified.)

19 (Plaintiff's Exhibit No. J, Photo,
20 was identified.)

21 (Plaintiff's Exhibit No. K, Photo,
22 was identified.)

23 (Plaintiff's Exhibit No. L, Photo,
24 was identified.)

25 (Plaintiff's Exhibit No. M, Photo,

1 was identified.)

2 (Plaintiff's Exhibit No. N, Photo,
3 was identified.)

4 (Plaintiff's Exhibit No. O, Photo,
5 was identified.)

6 (Plaintiff's Exhibit No. P, Photo,
7 was identified.)

8 (Plaintiff's Exhibit No. Q, Photo,
9 was identified.)

10 (Plaintiff's Exhibit No. R, Photo,
11 was identified.)

12 (Plaintiff's Exhibit No. S, Photo,
13 was identified.)

14 (Plaintiff's Exhibit No. T, Photo,
15 was identified.)

16 (Plaintiff's Exhibit No. U, Photo,
17 was identified.)

18 BY MR. ROTHERT:

19 Q. Okay. And are you familiar with the
20 scenes that are captured in those photographs?

21 A. Yes. Very familiar.

22 Q. How are you familiar with those scenes?

23 A. Well, I have a P.O. Box in Desloge,
24 Missouri, so I drive through these intersections
25 every day on my way to check the mail at my P.O.

1 Box. I also conduct a lot of business in
2 Desloge. And actually going back and forth from
3 Park Hills to St. Louis. So I basically travel
4 through here every day.

5 Q. So do you recognize the scenes that are
6 captured in those photographs?

7 A. Yes, sir.

8 Q. And what are they?

9 A. Those are -- there's pictures of the
10 city hall, the intersection there. The
11 intersection by the post office and the library
12 where we distribute flyers, and then there's the
13 VFW hall, which is about a block down the street
14 from city hall.

15 Q. Let me ask you this: Do all those
16 photographs show streets and intersections in the
17 City of Desloge, Missouri?

18 A. Oh, yes, every one.

19 Q. And based on your experience with the
20 area -- familiarity with the area and your review
21 of the pictures, are they an accurate depiction
22 of streets in Desloge?

23 A. Yes, they are.

24 MR. ROTHERT: I would move for
25 admission of Exhibits F through U.

1 MR. YOUNG: No objection, Your
2 Honor.

3 THE COURT: Exhibits F through U
4 will be admitted.

5 (Plaintiff's Exhibit No. F, Photo,
6 was received.)

7 (Plaintiff's Exhibit No. G, Photo,
8 was received.)

9 (Plaintiff's Exhibit No. H, Photo,
10 was received.)

11 (Plaintiff's Exhibit No. I, Photo,
12 was received.)

13 (Plaintiff's Exhibit No. J, Photo,
14 was received.)

15 (Plaintiff's Exhibit No. K, Photo,
16 was received.)

17 (Plaintiff's Exhibit No. L, Photo,
18 was received.)

19 (Plaintiff's Exhibit No. M, Photo,
20 was received.)

21 (Plaintiff's Exhibit No. N, Photo,
22 was received.)

23 (Plaintiff's Exhibit No. O, Photo,
24 was received.)

25 (Plaintiff's Exhibit No. P, Photo,

1 was received.)

2 (Plaintiff's Exhibit No. Q, Photo,
3 was received.)

4 (Plaintiff's Exhibit No. R, Photo,
5 was received.)

6 (Plaintiff's Exhibit No. S, Photo,
7 was received.)

8 (Plaintiff's Exhibit No. T, Photo,
9 was received.)

10 (Plaintiff's Exhibit No. U, Photo,
11 was received.)

12 MR. ROTHERT: I have no further
13 questions of this witness.

14 THE COURT: All right.

15 CROSS-EXAMINATION

16 BY MR. YOUNG:

17 Q. Good morning, Mr. Ancona.

18 A. Good morning.

19 Q. In your first amended verified complaint
20 that's marked Exhibit A it says that the
21 Traditionalist American Knights of the Ku Klux
22 Klan are an unincorporated association; is that
23 correct?

24 A. That's correct.

25 Q. So it does not constitute a legal

1 entity; correct?

2 A. No.

3 Q. How -- well, first of all, so who are
4 the members of this unincorporated association?

5 MR. ROTHERT: Your Honor, I have an
6 objection.

7 THE COURT: Okay.

8 MR. ROTHERT: I object to any
9 questions about who the members are of the
10 organization. The U.S. Supreme Court in AACP v.
11 State of Alabama found that there's immunity from
12 state scrutiny of membership lists, which an
13 association claims -- can claim on behalf of its
14 members to protect their private interests and
15 their interests in associating freely without
16 others, and that falls within the protection of
17 the Fourteenth Amendment. And so on that basis
18 we object.

19 THE COURT: All right.

20 MR. YOUNG: Your Honor, it seems to
21 me that I'm entitled to determine that there are
22 members in order to establish that this is a
23 proper party plaintiff.

24 I understand that there are rules
25 that allow an unincorporated association to be a

1 separate party, but I think I'm entitled to
2 understand what -- who and what that party is
3 including, since it's an unincorporated
4 association, an association of what and who.

5 THE COURT: Are you asking for the
6 names of the members?

7 MR. YOUNG: well, I guess --
8 initially, yeah -- well, maybe I ought to ask how
9 many members there are.

10 THE COURT: That might be a good way
11 to go about it.

12 MR. YOUNG: Because I'm not looking
13 for hundreds of names, by any means.

14 THE COURT: Right. Yes.

15 MR. ROTHERT: Our objection is only
16 to the names.

17 THE COURT: That's what I assumed.

18 MR. YOUNG: Okay.

19 THE COURT: So I think you can get
20 the information regarding the association without
21 the names.

22 MR. YOUNG: Okay. I will do that,
23 Your Honor.

24 THE COURT: Okay.

25 BY MR. YOUNG:

1 Q. How many members does the Ku Klux Klan
2 here have that's the Plaintiff?

3 A. I couldn't give an accurate estimate of
4 the numbers right now at this point. That
5 changes daily.

6 Q. Well, what's the last accurate number
7 you could give?

8 A. I don't really keep a tally of
9 membership.

10 Q. Do members pay any dues?

11 A. They do pay donations to help defray
12 costs for printing flyers, mailing information
13 packets to people, things like that.

14 Q. And is there a certain sum that's
15 required that they donate for those kinds of
16 efforts at some certain point in the year?

17 A. There is \$35 per year.

18 Q. All right. And the last time that you
19 collected \$35 from members how many members were
20 there?

21 A. I couldn't tell you that. I don't know.

22 Q. Now, you're the Imperial Wizard of the
23 Ku Klux Klan that we're talking about in this
24 case; right?

25 A. Yes, sir, I am.

1 Q. And does that mean you're the head --
2 the person who runs the show in this group?

3 A. Yes, sir.

4 Q. And you're not able to give me any
5 estimate of the number of members in this group?

6 A. No, sir, I'm not. That's not part of my
7 duties as to count the members.

8 Q. What is involved in determining who is
9 actually a member of this Plaintiff
10 unincorporated association?

11 A. What is involved?

12 Q. What do you require of someone before
13 you say they're a member of this Plaintiff
14 association?

15 A. Well, they're required that they fill
16 out an application.

17 Q. Okay. And do you have records of those
18 member applications on file somewhere?

19 A. I may have some.

20 Q. Do you have some kind of a contact list
21 to the members that identifies the members for
22 purposes of your communications about your
23 message?

24 A. I have a list of the people that I need
25 to speak to that are in charge. I'm the national

1 leader. So I have state leaders. They in turn
2 have people under them. So I don't have a list
3 of every single member in the organization.

4 I don't actively speak with every member
5 of the organizations. You know, it's a loosely
6 ran organization basically based on ideals.

7 Q. All right. Now, you said that you're
8 the head -- you're the head of the national
9 association; is that right?

10 A. The Imperial Wizard is the term, yes.

11 Q. And so are the members of your group
12 national in scope?

13 A. Yes, they are.

14 Q. And do you have any estimate of the
15 number of members in your organization? Is it
16 less than 50?

17 A. No. It's not less than 50.

18 Q. Okay. Is it more than 100?

19 A. Yes. It's more than 100.

20 Q. Is it more than a thousand?

21 A. I couldn't give you an accurate
22 estimate, so I don't want to give a number out.

23 Q. Well, tell me the top number you think
24 you could give me an accurate estimate of between
25 100 and 100,000.

1 A. I really can't recall a number right
2 now.

3 Q. How does the Traditionalist American
4 knights of the Ku Klux Klan relate to what is
5 sort of commonly known in the press as the Ku
6 Klux Klan on a national scope?

7 A. How does it relate to the press -- well,
8 what the press calls the Ku Klux Klan is
9 basically misinformation, propaganda, slander,
10 smears, so we don't relate to that at all.

11 Q. Okay. What I'm trying to understand is
12 is there -- are there other Ku Klux Klan national
13 organizations in the country?

14 A. I couldn't tell you. I can only speak
15 for Traditionalist American Knights of the Ku
16 Klux Klan. I believe we are the only Ku Klux
17 Klan in my estimation.

18 Q. Okay. Let me direct your attention to
19 Paragraph 12 of Exhibit A before you. In
20 Paragraph 12 it says that -- it says the Ku Klux
21 Klan for short form -- and that's what I'm going
22 to refer as to your Plaintiff organization
23 here --

24 A. Okay.

25 Q. -- describes itself as a white patriotic

1 Christian organization. what -- can you describe
2 to the Court what that is, what that means.

3 A. It's pretty self-explanatory. It's an
4 organization comprised of white Christian
5 patriots, people who care about their nation and
6 their race.

7 Q. Okay. So the membership is solely
8 white; is that right?

9 A. Yes, it is.

10 Q. And how do you determine race for
11 purposes of your membership?

12 A. Well, I can -- we don't do DNA testing,
13 so --

14 Q. That didn't answer my question. I'm
15 trying to understand how you determine who can be
16 a member.

17 A. The same way you determine if someone is
18 white. I look at them, and if they look white, I
19 would -- like you look like you might be a white
20 man. My attorneys look white. So that's
21 basically how I do it.

22 Q. All right. If someone is Hispanic, can
23 they be part of the organization?

24 A. Well, there's qualifications on the
25 application, and if you don't meet the

1 qualifications, you can't be a member.

2 Q. What are those qualifications on the
3 application?

4 A. I don't have an application in front of
5 me right now, so I really can't tell you, but,
6 yeah, you do have to be a white person, and you
7 have to be over 18. You have to be a Christian.
8 You have to believe that Jesus Christ is the son
9 of God, that he was raised from the dead on the
10 third day.

11 Q. All right.

12 A. You have to believe in the basic tenets
13 of Christianity and the teachings of the holy
14 bible. Those are -- you cannot be a homosexual
15 or have homosexual thoughts.

16 Q. Do you --

17 A. So we're an exclusive organization.
18 We're not inclusive.

19 Q. You're an exclusive organization --

20 A. Kind of like a lot --

21 Q. -- not inclusive: Is that what you
22 said?

23 A. Yeah, exactly.

24 Q. Does someone who's Christian have to be
25 an active member of a particular congregation in

1 order to qualify?

2 A. That's between them and God. We just
3 ask them if they believe in the basic tenets of
4 the Christian religion. If they answer yes,
5 they've met our qualification for that.

6 Q. Okay. Now, you go on in that same
7 sentence it says that your organization the Ku
8 Klux Klan bases its roots back to the Ku Klux
9 Klan of the early 20th century.

10 A. It's Ku Klux Klan.

11 Q. What does that phrase mean?

12 A. It's Ku Klux Klan, not Ku Klux Klan.

13 Q. I'm sorry. I mispronounced it?

14 A. Yes.

15 Q. I'm sorry.

16 A. Well, what that means is that the Ku
17 Klux Klan was revived by Colonel William Joseph
18 Simmons on Thanksgiving Eve in 1915. And he
19 wrote a constitution and laws based on the
20 original prescripts of the Klan. He wrote the
21 ceremonies and rituals that the Klan uses, which
22 are the ritual books for the Klan are called
23 klorans. So he wrote those ritual books. So we
24 base our organization on those -- his
25 constitution, laws, and those teachings and

1 ceremonies. We try to preserve those.

2 Q. Okay. So do you have copies of those
3 materials that you follow as your basis for your
4 tenets?

5 A. Yes. I have some historical copies of
6 those, yes.

7 Q. If someone is a Catholic, can they
8 belong to your organization?

9 A. Yes, they can. In fact, my Missouri
10 chaplain is a Catholic, as a matter of fact.

11 Q. When did you form this particular
12 unincorporated association?

13 A. It was -- I mean, it's been around for a
14 long time under various different names, but, I
15 mean, as far as under the name Traditionalist
16 American Knights I believe it was around May --
17 somewhere around May 22nd, 2008, but don't hold
18 me -- that's my best guess on that date.

19 Q. And did you form the organization
20 yourself?

21 A. I and other individuals who were
22 associating with each other.

23 Q. Are women allowed in the organization?

24 A. Yes, they are.

25 Q. Now, going on in that same Paragraph 12,

1 it says that you're -- the Ku Klux Klan is a
2 non-violent organization that believes in the
3 preservation of the white race. What does that
4 mean?

5 A. Well, it means we do not commit acts of
6 violence, and we believe in perpetuating our
7 race. We believe in having children and
8 grandchildren, white ones.

9 Q. Among white people only?

10 A. Right. We don't believe in -- we
11 believe, you know, that God created all the
12 races, and they all have their -- God created all
13 the races for a purpose.

14 And that if you read the creation story
15 of Genesis, after each thing he created, each
16 species, after its kind he saw that it was good.
17 So if God saw that it was good, we see no reason
18 to interfere with what God says is good.

19 Q. Okay. It goes on to state also that the
20 organization believes in the preservation of the
21 United States Constitution as it was originally
22 written. What does that mean?

23 A. Well, it means we believe in the
24 Constitution as it was originally written by our
25 forefathers that founded this nation.

1 Q. I'm just curious, does that mean you
2 don't agree with the amendments to the
3 Constitution as it's been amended?

4 A. No. No. The Constitution as it was
5 originally written provided for the Constitution
6 to be amended, so if they were lawfully enacted
7 amendments, we believe in them.

8 Q. The leaflets that have been marked as
9 exhibits here, is that the only leaflets that you
10 distribute as flyers, or are there other ones
11 with different contacts?

12 A. That's -- at that particular flyer drive
13 I really don't know, but, yeah, we do have other
14 flyers.

15 Q. Generally, can you describe for me what
16 the content of the other flyers is.

17 A. Well, we have -- in one of the flyers we
18 distributed in Desologe had to do with the Second
19 Amendment. That was -- in fact, that was one of
20 the biggest ones we did at the last flyer drive
21 we were pushing because of all the proposed gun
22 law legislation.

23 So we had a Second Amendment flyer that
24 we put together, and we were -- I believe that
25 was probably the main flyer that we passed out.

1 Q. Any other topics that --

2 A. We've got flyers that have to do with
3 drug dealing and pedophiles, you know, that
4 letting people know that we're keeping an eye out
5 for those type of people in our neighborhoods and
6 that we will alert law enforcement basically if
7 we see those type of activities.

8 Q. Have any of these activities of the
9 members of the Plaintiff organization led to any
10 violent confrontations?

11 A. No.

12 Q. Are you a resident of Desologe?

13 A. No.

14 Q. You only have a post office box in
15 Desologe; is that right?

16 A. Yes. Actually, it's -- the P.O. Box
17 says Park Hills, Missouri. I guess that's the
18 actual address, but it's at the Desologe Post
19 office.

20 Q. Okay. Are there other members of the
21 Plaintiff Ku Klux Klan that are residents of
22 Desologe?

23 A. Yes, I'm sure there are.

24 Q. Now, as Imperial Wizard of the Ku Klux
25 Klan here that's the Plaintiff what is your role?

1 A. Here?

2 Q. Let me rephrase the question.

3 Apparently, you didn't understand it.

4 What's your role as the Imperial Wizard
5 of the particular Plaintiff association here?

6 A. Well, I basically make all the decisions
7 for the organization as a whole on a national
8 level, so I run the national organization.

9 The state leaders have fairly free reign
10 to run the states, which we call realms. The
11 Grand Dragons run the realms as they see fit as
12 long as it's in keeping with our constitution and
13 laws, which we have a constitution and laws,
14 again, that was written by Colonel Joseph Simmons
15 in 1924 that we adhere to with the exception of a
16 few amendments, which we've amended, you know, to
17 reflect the times like as far as voting it
18 doesn't have to be done by mail anymore, and it
19 can be done by e-mail and just to update to the
20 times.

21 THE COURT: Did you say the states
22 are called rooms?

23 THE WITNESS: Realms.

24 THE COURT: Realms. R-e-a-l-m-s.

25 THE WITNESS: Realms, yes.

1 THE COURT: Okay. Thank you.

2 BY MR. YOUNG:

3 Q. And what are your duties then as the
4 national Imperial wizard?

5 A. Well, I just set the direction that I
6 believe the organization needs to go. You know,
7 I try to write content as far as flyers that I
8 feel need to be distributed based on the calls
9 that we're getting from the public to our
10 hotline.

11 You know, I make sure that the members
12 are performing the ceremonies and rituals that
13 are prescribed by the Klan in accordance with the
14 Kloran. It's K-l-o-r-a-n. Kloran. We make sure
15 that they are performing the rituals properly.

16 We have signs, ceremonies. You know,
17 and we make sure that they're doing those
18 properly -- that's my duty to make sure those are
19 done properly so that we preserve those
20 ceremonies throughout history.

21 Q. So what relationship does the Plaintiff
22 association have with any other groups that say
23 that they are associated with the Ku Klux Klan?

24 A. We really have no -- if you're talking
25 about like an alliance with another organization,

1 we have none.

2 Q. Okay.

3 A. You can see that by looking on the
4 internet there. They kind of bash us.

5 Q. Why do they bash you?

6 A. Well, I guess because we're not hateful
7 enough. We're not a hate group. You know,
8 there's pictures of me on the internet with a man
9 named Daryl Davis, a black man, who came to one
10 of our rallies. I went and had lunch with him at
11 Blake's Barbecue there in Desloge and then
12 invited him to one of our rallies where he
13 mingled with several members and attended a cross
14 lighting ceremony with us. So based on those
15 pictures and that special that was on National
16 Geographic I'm a traitor.

17 Q. So have the members of your group and
18 yourself distributed leaflets in any other towns,
19 cities or municipalities other than Desloge?

20 A. Many. Yes. Not just in Missouri but in
21 several other different states as well.

22 Q. Has that occurred this year?

23 A. Yes.

24 Q. Do you remember if you were distributing
25 leaflets within the roadways of Park Hills this

1 year?

2 A. Yes, we did.

3 Q. Was one of your members struck by a
4 motor vehicle while being out in the roadway
5 distributing leaflets this year?

6 A. I don't know of any member being struck
7 by a motor vehicle.

8 Q. You don't know of an instance where one
9 of your members was hit by a door of a car --

10 A. No, I don't.

11 Q. -- while the car traveled through the
12 roadway by that man?

13 A. I don't know if the member was hit by a
14 door, but I think the member tripped and fell is
15 what I understand, but I don't know. I don't
16 know. You're asking me about something I really
17 don't have full knowledge of it.

18 Q. Did the member trip and fall within the
19 roadway?

20 A. Again, I don't know. I wasn't there. I
21 wasn't standing where he was at. I was talking
22 with other people, and so -- I just basically
23 seen the guy getting up off the ground, but that
24 was in Park Hills, Missouri, yes.

25 Q. Have there ever been any other instances

1 where members who were distributing within
2 roadways in other cities were struck by motor
3 vehicles?

4 A. No.

5 Q. Okay.

6 A. And this guy -- no one was struck by a
7 motor vehicle, I don't believe. I don't -- that
8 sounds like a false --

9 Q. Do your members wear Klan robes and
10 hoods in the normal course of delivering your
11 message?

12 A. We have some members that will wear
13 regalia of the organization. Most of the time
14 that's reserved for rituals and ceremonies, but
15 we do from time to time wear the regalia.

16 Q. Have you had members of your
17 organization wear their Klan robes and hoods
18 while soliciting within the roadway in Desologe?

19 A. Well, you're calling it soliciting. I
20 call it handing out literature, but --

21 Q. I'm sorry. Let me rephrase the question
22 so the record is clear.

23 Have you had members wear their Klan
24 robes and hoods while distributing leaflets
25 within the roadway in Desologe?

1 A. Yes, we have.

2 Q. No official or policeman from Desologe
3 ever threatened to put you in jail because of the
4 pundit that you were involved in on that
5 particular day that you had that communication
6 with that person, did they?

7 A. No one threatened to put me in jail.
8 They just read the ordinance to me and what the
9 punishments were -- the prescribed punishments
10 were on the ordinance.

11 Q. And did anyone from Desologe ever
12 threaten to fine you as a result of your conduct
13 on a particular day?

14 A. Well, I was told that they would enforce
15 all the ordinances. When I asked if this -- I
16 stated the ordinance, which I -- the first
17 ordinance I felt was unconstitutional I was told
18 that regardless they would be enforced.

19 So now, if you look at the punishments
20 for violating those ordinances, they include
21 fines and jail, so no one specifically told me
22 that, but I read it in the ordinance.

23 Q. With regard to the ordinance that's at
24 issue today, which is the amended ordinance --
25 well, are you familiar with the ordinance that's

1 No. 2013.09, the most recent ordinance that
2 Desologe passed that's the subject of this
3 lawsuit?

4 A. I'm seeing on my copy 2013.04.

5 Q. Okay. I'm asking you about the
6 subsequent ordinance. Are you familiar with that
7 ordinance?

8 A. Not really. I'm not a law scholar. I
9 didn't go to school for that.

10 Q. Okay. So you've not had a chance to
11 read the Ordinance Number 2013.09?

12 A. All I know is I read the ordinance.

13 THE COURT: Yes. Yes. Hold on.
14 I'm sorry. Your lawyer is making an objection or
15 a statement.

16 MR. ROTHERT: I object to the
17 characterization he hasn't had a chance to read
18 it. We have had it marked as an exhibit, but we
19 haven't introduced it yet. You can give it to
20 him to read now if you would like now.

21 THE COURT: Your question was is he
22 aware or had he read this ordinance; correct?

23 MR. YOUNG: The Ordinance 2013.09.

24 THE COURT: The newest -- the
25 amended ordinance.

1 MR. YOUNG: That's right. That's
2 really all my question is.

3 THE COURT: That's the question.
4 Okay. You can answer that question.

5 THE WITNESS: So that's no, because
6 I don't have a copy of that.

7 BY MR. YOUNG:

8 Q. Okay. Let me make sure you understand
9 my question.

10 THE COURT: Right.

11 BY MR. YOUNG:

12 Q. Prior to you getting on the stand and
13 testifying today, have you read the ordinance
14 2013.09 that I'll refer to as the amended
15 ordinance?

16 A. Is that the ordinance that Officer Roney
17 gave me the day that we were at the flyer drive?

18 Q. I don't believe so. It's the ordinance
19 that I gave to your counsel after it was passed
20 in August of 2013.

21 A. Then I'm sure I read it, yes.

22 Q. Okay.

23 A. But, you know, I do not have a
24 photographic memory, so --

25 Q. After you read that and after that

1 ordinance was passed in August of 2013, has
2 anyone from Desologe -- whether an official or
3 policeman -- threatened to jail or fine you as a
4 result of any activity of the -- of you or the
5 organization?

6 A. As of what date was that now?

7 Q. In August of 2013 when that was passed.

8 A. We haven't been back out to distribute
9 flyers since then, so, no, we haven't.

10 Q. Okay.

11 A. But the ordinance states that -- if it's
12 the same one I'm thinking of, it states that
13 there's penalties, fines, including jail time and
14 fines for violating, so I'm assuming if I stepped
15 off the sidewalk on to the street and handed
16 someone a flyer, I would be in violation of that
17 ordinance.

18 MR. YOUNG: May I approach the
19 witness?

20 THE COURT: Yes, you may.

21 BY MR. YOUNG:

22 Q. So the record is clear, let me direct
23 your attention to what's been marked as
24 Defendant's Exhibit 5. And take a look at that,
25 and I want to ask and make sure that you've had a

1 chance to read this ordinance before you've taken
2 the stand today.

3 A. I believe I have, yes.

4 (Defendant's Exhibit No. 5,
5 Ordinance, was identified.)

6 BY MR. YOUNG:

7 Q. Pardon?

8 A. I believe I've read this one, yes.

9 Q. And there's nothing in that ordinance
10 that says anything about jail or fine; is that
11 correct?

12 A. I don't see anything in here, no.

13 Q. Okay. So this ordinance shows that it
14 was passed on August 12th of 2013; is that
15 correct?

16 A. Yes.

17 Q. Since that time have you or the
18 organization we've talked about as the Ku Klux
19 Klan here today taken any actions that were
20 stopped or you were warned about by anybody in
21 Desologe?

22 A. No. We haven't had a chance to go back
23 out yet.

24 Q. Now, you have no professional background
25 as a traffic safety engineer, do you?

1 A. No, I don't.

2 Q. And you have no qualifications to
3 determine if you or your members are safe while
4 you're present within roadways of Desologe --

5 A. Oh, yeah, I think I do have
6 qualifications.

7 Q. Excuse me. Let me finish my question,
8 please.

9 THE COURT: And I will just mention
10 this. Please try not to talk at the same time,
11 because everything is being recorded, and we
12 can't get it. So allow him to finish his
13 question before you start answering: Okay?

14 THE DEFENDANT: Yes, Your Honor.

15 MR. YOUNG: Thank you, Your Honor.

16 BY MR. YOUNG:

17 Q. Let me start that question over again.
18 You have no qualifications to determine if you or
19 your members are safe while you're present within
20 the roadways of Desologe, do you?

21 A. Yes, I believe I do have qualifications.
22 I'm 48 years old. I've been crossing streets for
23 probably, what, 47 years. I can't remember the
24 exact date I started walking, but at least since
25 I was in kindergarten, you know, five years old I

1 was crossing roadways, and I've never been struck
2 by a vehicle.

3 I've been doing these types of
4 literature distributions for several years, never
5 been struck by a vehicle. So I think I'm
6 qualified to determine whether I'm safe when I
7 cross a street or not.

8 And in this case we don't even cross a
9 street. A car comes to a stop sign, they hold
10 their hand out for a flyer. We step up to the
11 vehicle. And so the vehicle is stopped at a stop
12 sign, and we hand them the flyer, and we walk
13 back. So I think we're all intelligent enough to
14 determine that.

15 Q. Let me ask this question: I'll come
16 back to your qualifications in a minute.

17 A. Are you saying I'm not qualified?

18 Q. Are you telling me that under no
19 circumstances has a member of the organization
20 that's the Plaintiff here, the association, had a
21 member stand and continually stand in the street
22 while there's a stream of cars coming up to a
23 stop sign or to a stop traffic signal where they
24 stay out in the street as additional cars go by?

25 A. Not that I know of, no.

1 Q. You're saying that's not happened?

2 A. Not that I've seen.

3 Q. That stands out there?

4 A. Not that I've seen.

5 Q. Really?

6 A. Not that I've seen. Exactly.

7 I mean, I pay -- you know, everybody
8 that's out there passing out flyers is
9 responsible for making sure they're safe and that
10 they do it in a safe manner. So when I'm handing
11 out flyers, I'm watching out for my own safety,
12 so I'm not necessarily seeing everything every
13 person is out there doing.

14 Q. Does the Ku Klux Klan that's the
15 Plaintiff association here have any written
16 policies regarding how the members are to conduct
17 themselves in roadways while distributing
18 leaflets?

19 A. No.

20 Q. Let's go back to your qualifications a
21 minute. You have no specialized training
22 regarding the safety of pedestrians or people in
23 roadways; is that correct?

24 A. Again, I've got 47 years of experience.
25 It's personal.

1 Q. I asked if you have specialized
2 training.

3 A. That's your opinion. My opinion is I
4 have 47 years of training, life experience
5 crossing streets and standing on sidewalks.

6 Q. I'm sorry. I'll try not to talk over
7 you. Do you have an engineering degree?

8 A. No, I don't.

9 Q. What do you do for a living?

10 A. I'm an independent contractor.

11 Q. In what area?

12 A. In transportation.

13 Q. You run a truck for people?

14 A. Delivery service.

15 Q. Delivery service?

16 A. Uh-huh.

17 Q. Okay. So have you ever had any kind of
18 specialized training regarding the safety of
19 pedestrians, and I'm talking about classes or
20 courses or degrees in that type of area?

21 A. I've had training as a driver, yes, on
22 safety of pedestrians. Also, I'm DOT -- or not
23 the -- what do you call it -- TSA certified,
24 so --

25 Q. But you've really not had any training

1 that where you've had educational training about
2 safety within roadways for pedestrians; right?

3 A. Not in a school, no. On the street of
4 hard knocks, yes.

5 Q. It is true, isn't it, that under the
6 ordinance that's marked Defendant's Exhibit 5
7 that you and your members can distribute
8 literature from the tops of curbs; is that
9 correct?

10 MR. ROTHERT: Your Honor, I object
11 on the basis it's calling for a legal conclusion
12 for him to interpret the ordinance --

13 THE COURT: All right.

14 MR. ROTHERT: -- to interpret what
15 it means when it defines roadway.

16 THE COURT: All right. I will
17 overrule the objection based on the question that
18 he asked.

19 BY MR. YOUNG:

20 Q. Can you answer?

21 A. Well, if you look at the picture on
22 Plaintiff's Exhibit F, and you look at the
23 sidewalk here, and you look at the street, the
24 person that comes up to the stop sign, there's no
25 way unless I had arms that were maybe 12 feet

1 long that I could reach to a person's car without
2 stepping off the sidewalk. So, no, there's no
3 way that could be done.

4 Q. If the car came over close enough to the
5 top of the curb or the sidewalk, you could hand
6 that into the car that was parked there; is that
7 correct?

8 A. If they did that. I don't know. You
9 know, you're speculating on how people are
10 driving out there. I don't know. In my
11 experience they stay on the street. They don't
12 drive over on to the curb. They stay on the
13 street at the stop sign.

14 Q. Is it possible for you to distribute
15 literature from the city parking lot or within
16 the city parking lot?

17 A. I don't know who I would distribute the
18 literature to since nobody comes to the parking
19 lot to get literature, but they do come through
20 the intersection, and it's visible there and
21 people can see us.

22 Q. But it's possible for you to distribute
23 to people in the city parking lot; correct?

24 A. I don't know. I don't write the laws
25 for Desologe. You tell me.

1 Q. Is it possible for you to distribute
2 literature while standing on any sidewalk in
3 Desologe?

4 A. Again, I don't know the laws that well
5 in Desologe. If the police would allow me to do
6 it, I'm sure I could do it.

7 Q. Okay. And, finally, it's possible
8 there's -- a large city park in Desologe, isn't
9 there?

10 A. Yes.

11 Q. It's possible for you to circulate and
12 distribute anywhere in that park the leaflets; is
13 that right?

14 A. It's possible, but the place where we
15 reach most people is that intersection, which is
16 basically the post office, the library and, I
17 believe the two businesses that don't even
18 operate there anymore. The 7-11 is closed down.

19 Q. And you described that the --

20 A. But it's still got enough -- there's
21 more visibility there than there is in the park.

22 Q. And in that instance you have to go out
23 into the roadway where the motor vehicles are
24 being operated in order to distribute your
25 leaflets; is that correct?

1 A. We may, and we may not. It depends on
2 where the person stops at. If they pull up right
3 up to the curb, we may not have to. If they're
4 stopped on the roadway, like, again, if you see
5 the distance from the sidewalk to the street, no,
6 then we would have to step out onto -- I wouldn't
7 consider it the street. I would consider it the
8 curb, the shoulder.

9 I mean, I don't know what your legal
10 term for that is, but, so -- I mean, we're not --
11 if I park my car there, I would have to step on
12 to that same space of the street. Am I violating
13 the law when I do that? Because I do that every
14 day when I go to Desologe Post Office to pick my
15 mail up. I park on the street, and I open my car
16 door up, and I step out from my car, and I'm
17 right up on the street. And I have to walk
18 around my car to the sidewalk.

19 Q. All I'm trying to get through and make
20 it clear is there are alternative means for you
21 to distribute the leaflets and get your message
22 out other than when you have to be within the
23 roadway; is that correct?

24 A. Well, there are alternatives, but
25 they're not as good -- they're not as good of

1 visibility as we have there.

2 We have -- that's the most cost
3 effective way for us to distribute the leaflets
4 is at that intersection in the town of Desologe
5 from my studies. And I do believe I'm qualified
6 to --

7 MR. YOUNG: All right. Your Honor,
8 I'm going to ask -- I think he's answered my
9 question. His run-on answers are more his
10 speech, I guess.

11 THE COURT: I think that the
12 question has been asked and answered, and, yeah,
13 you can --

14 MR. YOUNG: I have no further
15 questions at this time, Your Honor.

16 THE COURT: Okay. All right.

17 REDIRECT EXAMINATION

18 BY MR. ROTHERT:

19 Q. Mr. Ancona, you mentioned that there's a
20 favorite intersection in Desologe to distribute.
21 Is that intersection in any of the pictures
22 Exhibits F through U?

23 A. Let me see it. There is a picture. It
24 looks like P is probably the best picture of the
25 intersection that we use.

1 Q. Okay.

2 A. And you can see like on the left there's
3 a vacant business here. And you can see like
4 this big curb. The sidewalk is -- the sidewalk
5 on the left is -- I don't know -- judging I'll
6 guess, what, 5, 6 feet from the actual street.

7 Q. All right.

8 MR. ROTHERT: I have no further
9 questions.

10 THE COURT: Okay.

11 MR. YOUNG: I have nothing further.

12 THE COURT: All right. You may step
13 down.

14 MR. ROTHERT: Your Honor, we would
15 like to move for admission of Plaintiff's Exhibit
16 V, which is a certified copy of Ordinance Number
17 2013.09. It's the same as Exhibit 5.

18 (Plaintiff's Exhibit No. V,
19 Ordinance, was identified.)

20 THE COURT: Oh, that's 5. Okay.

21 MR. YOUNG: I have no objection,
22 Your Honor.

23 THE COURT: Exhibit V will be
24 admitted into evidence.

25 (Plaintiff's Exhibit No. V,

1 Ordinance, was received.)

2 MR. ROTHERT: The rest of our
3 testimony will be by -- our further testimony or
4 our other witnesses will be by affidavit.

5 THE COURT: Okay.

6 MR. ROTHERT: We have two additional
7 witnesses. Exhibit W is the affidavit of Frank
8 Douma from the University of Minnesota.

9 (Plaintiff's Exhibit No. W, Douma
10 Affidavit, was identified.)

11 MR. ROTHERT: And Exhibit X is the
12 affidavit of Daniel E. Burden, a walkability and
13 active transportation technical assistance
14 provider.

15 (Plaintiff's Exhibit No. X, Burden
16 Affidavit, was identified.)

17 MR. ROTHERT: And their
18 qualifications and their testimony is set
19 forth in Exhibits -- sorry -- W and X. So I
20 would move for admission of Exhibits W and X.

21 THE COURT: All right. Mr. Young.

22 MR. YOUNG: Your Honor, it's a
23 motion for preliminary injunction. This is not a
24 temporary restraining order. I don't think an
25 affidavit is appropriate. I think live testimony

1 is the only thing that is permitted. And I think
2 that this denies us any opportunity to confront
3 these witnesses or to cross-examine any
4 witnesses.

5 So I'd ask the Court to deny the
6 admission of these. We have no opportunity to
7 cross these, and there's no reason the Court
8 should have to accept these as if they are
9 properly admitted.

10 THE COURT: All right.

11 MR. ROTHERT: I have three
12 responses. First, as a matter of law that is --
13 it's just incorrect. Hearsay affidavits are
14 allowed in preliminary injunction hearings.
15 Recently, in ACORN v. Scott the western
16 district -- or the United States District Court
17 for the Western District of Missouri noted that
18 at a preliminary injunction hearing procedures
19 are less formal. And they cite a -- and that
20 court cited a decision from this court at
21 230 F.Supp.2d. 980 footnote 4 that hearsay
22 affidavits are admissible in a preliminary
23 injunction hearing.

24 Second --

25 THE COURT: What was that site

1 again?

2 MR. ROTHERT: The western
3 district court --

4 THE COURT: What was the Supp -- the
5 cite for this?

6 MR. ROTHERT: Okay. It was BeBe
7 Department Stores v. May Department Stores, 230
8 F.Supp.2d. 980. It's at footnote 4. That was
9 cited by ACORN v. Scott, which is recorded at
10 2008 WL 278 7931 at footnote 5.

11 The second point is that the Eighth
12 Circuit ruled back in 1974 that by its nature an
13 application for preliminary injunction requires
14 an expeditious hearing and decision. And in
15 order to overcome the problems that would be
16 created in attempting to gather the necessary
17 witnesses it has often been held that affidavits
18 may be received on a motion for preliminary
19 injunction.

20 That's a direct quote from Wounded
21 Knee Legal Defense/Offense Commission v. Federal
22 Bureau of Investigation, 507 F.2d 1281. And the
23 pin cite is 1287 through 1280 -- I'm sorry, 1286
24 to 1287.

25 I think that's especially pertinent

1 here where the new ordinance and the consultant
2 report we received about a couple weeks ago and
3 the expedited nature of this hearing is caused by
4 Defendant's decision to have its ordinance go
5 into effect on a quick basis, so we only have a
6 short, short time.

7 And our witnesses -- you know, one
8 is in Minnesota and one is in Hawaii, so
9 they're -- and we got their affidavits last night
10 and this morning, so there would be no way to
11 actually have them here.

12 Third, the 7th Circuit has held
13 directly -- and I'll quote, Affidavits are
14 ordinarily inadmissible at trials, but they are
15 fully admissible in summary proceedings,
16 including preliminary injunction proceedings.
17 That's in Ty v. GMA Accessories, which is
18 recorded at 132 F.3d 1167 at page 1171. And it's
19 quoting the 11th circuit or citing the 11th
20 Circuit for the same proposition.

21 THE COURT: All right. Mr. Young.

22 MR. YOUNG: Your Honor, first of
23 all, I think this is within the discretion of the
24 Court.

25 These -- I've never seen these until

1 literally just now. They apparently purport to
2 be expert opinions. I disagree. I gave them a
3 copy of Mr. Brammeier's report right at the same
4 time as the ordinance was passed back in August.
5 They've had that time to work with his report.
6 He's going to be here live and testify. They'll
7 have a chance to cross-examine him.

8 I have no chance to cross-examine
9 these people. I don't even know who they are. I
10 don't even know what the topic is. But it seems
11 to me, Your Honor, this is a little bit of trial
12 by ambush.

13 And while it's a preliminary
14 injunction hearing, that's not necessarily the
15 same thing as a temporary restraining order. And
16 I think that these kind of affidavits are
17 inappropriate and should not be admitted for the
18 purposes of their being -- I mean, the little bit
19 I looked at it looks like they're taking complete
20 shots at Mr. Brammeier's report with me having no
21 opportunity then -- and so I think we're being
22 denied due process.

23 And this is a significant hearing in
24 that as a result of this the Court makes a
25 determination about the constitutionality of this

1 particular ordinance. I just don't -- I think
2 it's inappropriate to try to admit these kinds of
3 affidavits. I'm not familiar with the cases
4 they're talking about to know whether they're
5 perfunctory affidavits identifying an ordinance
6 or whether they're substantive expert opinions
7 that I have had no chance to test, no chance to
8 look up qualifications.

9 I'd ask the Court to deny admission
10 of these.

11 THE COURT: And I will say that I'm
12 not familiar with the cases either. And I am
13 concerned, because they do appear to be expert --
14 affidavits from experts.

15 Do you have cases on point involving
16 affidavits from experts or which purport to give
17 expert testimony?

18 MR. ROTHERT: Yes.

19 THE COURT: Because I will tell you
20 I do have a concern about the fact that there is
21 no ability to cross-examine, you know, from their
22 standpoint.

23 MR. ROTHERT: well, there is -- I
24 mean, any party can ask for discovery before a
25 preliminary injunction hearing, and we didn't

1 conduct discovery and neither did they or ask for
2 it.

3 THE COURT: But the --

4 MR. ROTHERT: And also, you know, I
5 just want to correct a fact. We were not given
6 this report until it was filed with the Court on
7 a Monday before a Thursday hearing. So we also
8 had no opportunity to cross-examine before the
9 initial hearing.

10 THE COURT: I thought that report --
11 that -- wasn't that report available -- I thought
12 we had it.

13 MR. ROTHERT: It was attached --

14 THE COURT: Yeah. It was attached
15 to their -- am I correct -- it seems to me that
16 we've had that -- the expert report, and I don't
17 remember how we got it, if it was attached to
18 their response, or something like that. I'm not
19 quite sure.

20 MR. ROTHERT: Yes. It was filed on
21 Monday -- our original hearing was scheduled for
22 a Thursday. It was filed that Monday with the
23 Court.

24 THE COURT: Right.

25 MR. ROTHERT: And we got it when the

1 Court got it.

2 Several of the cases cited in the
3 wounded knee case I believe but I can't say for
4 sure have to do with expert testimony. I just
5 know we've done it several times in several
6 courts without there being objection. So I don't
7 know the specific case.

8 Also, I believe the cases -- if
9 anything, they -- you know, the affidavits have
10 to be admitted, but you could consider the lack
11 of opportunity to cross-examine and the weight
12 given -- the weight to give to the testimony by
13 affidavit.

14 And, you know, if the preliminary --
15 if the ordinance wasn't going into effect, we
16 would have no objection to continuing the hearing
17 to give an opportunity for discovery.

18 THE COURT: I understand.

19 MR. ROTHERT: But it's the
20 Defendant's choice to make that ordinance go into
21 effect.

22 THE COURT: Okay. Mr. Young.

23 MR. YOUNG: The only other thing
24 I'll add is that I think because these are expert
25 witness opinions, and they're particularly

1 attacking a report that they've had, I think we
2 end up without the ability to cross-examine, and
3 it denies due process in the context of this
4 particular decision about the validity of this
5 ordinance.

6 THE COURT: Okay. I will -- I will
7 overrule your objection. And basically I do
8 believe that it will go to the weight of the
9 evidence, not the admissibility of the evidence.

10 In addition, you will -- you do plan
11 to have an expert testifying, or is it just your
12 report, just out of curiosity? I don't --

13 MR. YOUNG: Your Honor,
14 Mr. Brammeier is out in the hallway. He's here
15 ready to testify. And we'll offer the report as
16 well.

17 THE COURT: All right. And you'll
18 offer his report. And he will have an
19 opportunity, I guess, to see these affidavits.
20 And if there's something you would like to -- you
21 can also use it, you know, with regard to his
22 testimony as well.

23 MR. YOUNG: I understand. There's
24 not a lot of time to do that.

25 THE COURT: So it will go to the

1 weight of the evidence, and so it is overruled.
2 And so the Court will admit the Exhibits W and --
3 it was W and X; correct?

4 MR. ROTHERT: W and X, Your Honor.

5 THE COURT: Okay. Those will be
6 admitted into evidence.

7 (Plaintiff's Exhibit No. W, Bouma
8 Affidavit, was received.)

9 (Plaintiff's Exhibit No. X, Burden
10 Affidavit, was received.)

11 MR. ROTHERT: Can I have just one
12 moment?

13 THE COURT: Yes.

14 MR. ROTHERT: Plaintiff has no
15 further evidence.

16 THE COURT: Okay. What we're going
17 to do now is we've been going for about an hour
18 now. We'll take about a ten-minute break. And
19 then the defense can present their evidence. All
20 right.

21 (Proceedings stood in temporary
22 recess.)

23 THE COURT: All right. We're back
24 in session, and you may present your evidence.

25 MR. YOUNG: Thank you, Your Honor.

1 THE COURT: Mr. Young.

2 MR. YOUNG: The first thing I'd like
3 to do is make a motion to dismiss the Plaintiff's
4 unincorporated association. I don't think it
5 meets the definition based on the testimony that
6 we've heard today, and I think they should be
7 dismissed out of the case. Obviously, Mr. Frank
8 Ancona would still be a plaintiff, but I'd make
9 that motion at this time.

10 THE COURT: All right. Your
11 response to that?

12 MR. ROTHERT: If the Court is
13 inclined to grant that motion, I'd ask for a
14 chance to file a brief in opposition.

15 The -- I'm trying to remember the
16 name of the case from Washington about that apple
17 industry consumer group. I think an organization
18 that has -- well, even 20 or 30 members is
19 sufficient for association initial standing if
20 the members of the organization are affected by
21 the ordinance. And the testimony I think was
22 that there are at least 100 members of the
23 organization here.

24 Also, as far as a motion to dismiss,
25 you would construe the allegations in the light

1 most favorable to the Plaintiff. So I'd ask you
2 to deny the motion to dismiss.

3 THE COURT: Okay. All right. I
4 don't have -- with regard to the testimony he did
5 give some testimony regarding generally speaking
6 the number of members somewhat of the
7 organization and the purposes of the
8 organization.

9 And what is it that -- and it is --
10 basically this is a dismissal on the pleadings;
11 correct?

12 MR. YOUNG: Yes.

13 THE COURT: I'm going to deny the
14 motion to dismiss, but I understand that you have
15 to preserve that issue.

16 MR. YOUNG: I understand. At this
17 time I'd like to call Mr. Greg Camp to the stand.

18 THE COURT: Okay.

19 MR. YOUNG: Would you step over and
20 be sworn, please.

21 GREGORY CAMP,
22 being produced and sworn, testified as follows:

23 THE CLERK: Would you state your
24 name and spell your name for the record.

25 THE WITNESS: Gregory Camp.

1 C-a-m-p.

2 DIRECT EXAMINATION

3 BY MR. YOUNG:

4 Q. Would you state your name, please.

5 A. Gregory Camp.

6 Q. What is your address?

7 A. 205 South Trailwood, Desloge, Missouri.

8 Q. And who are you employed by?

9 A. The City of Desloge.

10 Q. What's your position with the City?

11 A. I'm the city administrator for the City
12 of Desloge.

13 Q. And in that position describe your
14 duties.

15 A. I'm responsible for the day-to-day
16 operations of the City. Department heads report
17 to me. And I serve at the pleasure of the mayor
18 and the board of aldermen.

19 Q. And in conjunction with the business of
20 the board of aldermen and the ordinances they
21 pass what's your relationship with the board of
22 aldermen on that topic?

23 A. Specific to ordinances obviously we take
24 direction from the mayor and the board. If
25 there's a particular area that they feel needs to

1 be addressed, whether it's updated, whether it's
2 something new, obviously we do that in
3 conjunction with legal counsel or help from the
4 municipal league.

5 Q. And how long have you held that position
6 with Desologe?

7 A. I've been with the City of Desologe
8 since June of 2007.

9 Q. Okay. And so can you describe
10 specifically for the Court your involvement in
11 that capacity in conjunction specifically with
12 ordinances that are presented or that come up for
13 consideration before the board.

14 A. Depending on the type of ordinance it's
15 typically crafted by myself with the assistance
16 of the city clerk, reviewed by legal counsel at
17 which time if there needs to be any changes made.
18 But then that ordinance is presented to the mayor
19 and board of aldermen at a regular monthly
20 meeting with notice given prior, and then, of
21 course, would be approved or denied by a motion
22 and a roll call vote by the board.

23 Q. Prior to becoming the city administrator
24 did you have a role or some relationship with the
25 City of Desologe for some time?

1 A. I was an aldermen for the City of
2 Desologe in 1997 until 2000. I was the mayor of
3 the City of Desologe from 2000 until 2005.

4 Q. And in any gap times were you always
5 more or less involved in the business of the City
6 of Desologe?

7 A. I'm a resident of Desologe, so, yes,
8 I've always been interested, yes.

9 Q. All right. So you've had knowledge and
10 involvement with the City of Desologe for over
11 16 years; is that correct?

12 A. Correct.

13 Q. In that period are you aware that
14 Desologe had concerns regarding public safety of
15 pedestrians or people within the streets of
16 Desologe?

17 A. I am.

18 Q. How did you first become aware of that
19 concern?

20 A. Back in 1999 specifically there was
21 concern by the mayor and board at the time
22 concerning specifically groups that would be
23 soliciting donations: Ball clubs, usually
24 baseball teams, 12, 13 year olds that were
25 raising funds to go to a little league world

1 Series. That was where it all really began.

2 Q. And what was the conduct that the mayor
3 and the board was concerned about initially at
4 that time?

5 A. They were deeply concerned -- of course,
6 as a member of the board at the time, deeply
7 concerned about obviously having a pedestrian --
8 and in this very specific case a child struck by
9 a moving vehicle.

10 Q. Did -- how did the -- and in those
11 particular instances what was the solicitation or
12 distribution? What was the activity? How was it
13 being performed in the roadway?

14 MR. ROTHERT: Your Honor, I object
15 to lack of foundation for how he would know or
16 whether this is based on personal information or
17 hearsay as to what activity.

18 MR. YOUNG: Your Honor, it's being
19 offered -- he's on the board of aldermen during
20 this time period.

21 THE COURT: Right.

22 MR. YOUNG: It's being offered for
23 what caused Desologe to take actions in response
24 to particular activities that were reported to
25 them. I don't think personal knowledge is

1 necessary in that instance.

2 THE COURT: Overruled.

3 BY MR. YOUNG:

4 Q. Do you remember the question?

5 A. No.

6 Q. Okay. What I was asking was what -- can
7 you describe for me the kinds of activity that
8 was going on within the roadways that caused you
9 to have concern about safety.

10 A. Well, you can imagine a baseball team of
11 12, 13-year old boys, say 15 of them, and
12 hopefully some adult supervision, but typically
13 maybe not being as attentive as they needed to be
14 drivers would slow, come to a stop with the offer
15 of some money that they could drop in a baseball
16 helmet for the fundraiser.

17 Q. All right. And were there other
18 instances of that same type of solicitation or
19 distribution out in the roadways that were a
20 concern?

21 A. Sure. And that's one particular
22 instance that I recall specifically. There were
23 other instances in general involving other groups
24 or organizations, whether it would be for the
25 solicitation of funds, or if they were just

1 handing out informational flyers about a bake
2 sale or a car wash or something along that line.

3 Q. Okay. Now, in that time period where
4 you're familiar with the business of the City of
5 Desologe was there an instance where a person who
6 was on foot within a roadway was injured by a
7 motor vehicle within the City of Desologe?

8 A. In 2001 a crossing guard, who you would
9 presume had the right to be in the roadway, they
10 were holding a stop sign at a cross intersection,
11 and they were struck by a vehicle.

12 Q. Okay. As a result of these concerns
13 about public safety in the streets what steps did
14 you witness Desologe to take in an effort to
15 address these safety issues?

16 A. The original ordinance, of course, which
17 was drafted and approved by the board back in
18 1999.

19 Q. Okay. And then subsequent to that -- we
20 know what happened with regard to Judge
21 Fleissig's decision on that ordinance.
22 Subsequent to that -- so I'm talking about
23 roughly in the April 2013 time period so the
24 record is clear -- was Desologe still concerned
25 about an issue with respect to the conduct of

1 people in the roadway?

2 A. Yes. Absolutely. And --

3 Q. I'm sorry.

4 A. I'm sorry.

5 Q. Go ahead.

6 A. An ordinance was passed at that time.

7 Q. I was going to ask you what did Desologe
8 do in response to that. So you said an ordinance
9 was passed at that time; is that right?

10 A. Correct.

11 MR. YOUNG: Your Honor, we may have
12 double markings, but rather than me hunt through
13 there I have mine in order. I'll just -- unless
14 you don't want me to mark them again. It's the
15 same stuff that's already been admitted. Would
16 you rather me use their version?

17 THE COURT: It doesn't matter.

18 MR. YOUNG: Okay.

19 THE COURT: You can use your
20 version. That's fine.

21 BY MR. YOUNG:

22 Q. I've handed you what's been marked as
23 Defendant's Exhibit 1 and ask you if you can
24 identify that.

25 A. This is ordinance 2013.04 which repealed

1 the old ordinance from 1999, 615.070, and then
2 established a new section 220.205, which dealt
3 with pedestrians being prohibited from soliciting
4 in the roadways.

5 (Defendant's Exhibit No. 1,
6 Ordinance, was identified.)

7 BY MR. YOUNG:

8 Q. All right. And what was the purpose of
9 that particular ordinance being passed?

10 A. We were trying to -- obviously, the
11 concern over having an ordinance of the City of
12 Desologe that was, perhaps, deemed
13 unconstitutional, we wanted to try to craft an
14 ordinance that would allow us to address the
15 governmental interest that we had at hand, which
16 was the concern over pedestrian safety, but at
17 the same time do something that would pass
18 constitutional muster.

19 Q. Okay. After that -- and I'm going to
20 refer to that Exhibit 1 as the initial ordinance.

21 A. Uh-huh.

22 Q. And then the ordinance that came along
23 later I'll refer to that as the amended
24 ordinance, but I'll have you identify it later.

25 But after that initial ordinance was

1 passed what happened relative to the Plaintiffs
2 or any of them and the City of Desologe in terms
3 of any contact?

4 A. They staged a demonstration or a -- had
5 a -- scheduled a place -- a time to distribute
6 flyers at that time later in April after the
7 passage of the ordinance.

8 Q. All right. Was that April 26th?

9 A. Yes.

10 Q. Okay. And were you involved at all that
11 day?

12 A. I was not.

13 Q. Okay. So ultimately after this
14 ordinance marked Exhibit No. 1 -- the initial
15 ordinance -- was passed, what steps were taken,
16 if any, regarding enforcement of that ordinance
17 against any of the Plaintiffs?

18 A. As far as enforcement an ordinance
19 was -- at the time of that April 26th instance
20 they were provided with a copy of the ordinance,
21 and they were asked to comply with the ordinance.
22 There was no other contact with them following
23 that.

24 It was brought to our attention that
25 there may be a lack of clarity in the ordinance

1 specific to the definition of a sidewalk and
2 roadway, and we felt we needed to suspend
3 enforcement of the ordinance at that time.

4 Q. And was that brought to your attention
5 by reason of the filing of this lawsuit by the
6 Plaintiffs as to the initial ordinance?

7 A. Yes.

8 Q. And so in response to that filing of
9 that ordinance what did the City do in terms of
10 trying to reconsider the ordinance based on what
11 the lawsuit said?

12 A. Well, obviously we talked with legal
13 counsel. We also felt that we needed to take a
14 step back from the process of the ordinance and
15 take a look at the problem itself, which is the
16 pedestrians in the roadway.

17 Q. All right. Before you get to that let
18 me just ask you then, as a result of that initial
19 lawsuit did the City agree with the Plaintiffs
20 through their counsel in order to take -- that
21 they would hold in abeyance any enforcement of
22 that initial ordinance --

23 A. Yes. Yes, we did.

24 Q. -- for some period of time?

25 A. Yes, we did.

1 MR. ROTHERT: Your Honor, I object.
2 That calls for hearsay.

3 THE WITNESS: I provided a letter --

4 THE COURT: I'm sorry.

5 MR. YOUNG: Wait, wait, wait. The
6 Court has to rule.

7 THE COURT: I'll overrule it.

8 BY MR. YOUNG:

9 Q. Let me hand you -- I've handed you
10 what's been marked as Defendant's Exhibit 2, and
11 I'd ask you if you can identify that document?

12 A. Yes, I can. It's a letter from me to
13 Grant Doty of the ACLU.

14 (Defendant's Exhibit No. 2, Letter,
15 was identified.)

16 BY MR. YOUNG:

17 Q. And what's the stated purpose of the
18 letter in short form?

19 A. That the City will hold in abeyance the
20 enforcement of the initial ordinance, 220.205,
21 and that the City would provide notice if there
22 was any amendment to that ordinance.

23 Q. And did the City also agree to cover
24 some attorney's fees?

25 A. Yes, we did.

1 MR. YOUNG: Your Honor, I'm going to
2 offer into evidence Defendant's Exhibit 2.

3 THE COURT: Any objection?

4 MR. ROTHERT: No objection.

5 THE COURT: Exhibit 2 will be
6 admitted into evidence.

7 (Defendant's Exhibit No. 2, Letter,
8 was received.)

9 BY MR. YOUNG:

10 Q. I've handed you what's marked as
11 Defendant's Exhibit 3 and ask you, first, are you
12 copied on that particular letter?

13 A. Yes. Yes, I am.

14 (Defendant's Exhibit No. 3, Letter,
15 was identified.)

16 BY MR. YOUNG:

17 Q. And is that letter dated the same day
18 that your letter was that's marked Exhibit 3?

19 A. May 7th, yes.

20 Q. Exhibit 2, excuse me.

21 A. Yes.

22 Q. And this is a letter from the chief of
23 police also indicating that any enforcement will
24 be held in abeyance until any amendment of the
25 ordinance?

1 A. Correct. Correct.

2 Q. And you directed the chief to take this
3 action; is that right?

4 A. Yes.

5 MR. YOUNG: I'll offer into evidence
6 Exhibit 3.

7 THE COURT: Any objection?

8 MR. ROTHERT: No objection.

9 THE COURT: Exhibit 3 will be
10 admitted.

11 (Defendant's Exhibit No. 3, Letter,
12 was received.)

13 BY MR. YOUNG:

14 Q. All right. So after May 7th, when these
15 letters were written, you mentioned earlier the
16 City decided to take a step back. Describe what
17 the City did next with respect to its concern
18 about this public safety in the roadway issue.

19 A. Well, the City had history with a
20 traffic engineering firm by the name of Crawford,
21 Bunte & Brammeier, David Brammeier being one of
22 the principals. He had assisted us in trying to
23 acquire some federal and state funding on some
24 road and highway projects within Desologe. And
25 we asked Mr. Brammeier if he could come to take a

1 look at the pedestrian in the roadway issue for
2 us.

3 Q. All right. Specifically do you remember
4 what you asked him to do?

5 A. Basically provide us with a
6 comprehensive, objective look at all of the areas
7 within Desologe where potentially pedestrians and
8 automobiles are going to come in contact with
9 each other, specifically the roadways, and
10 determine for us whether or not it was safe or
11 not for the pedestrians to be there.

12 Q. And for to be there for a particular
13 purpose?

14 A. Correct. Distribution or solicitation.

15 Q. Okay. So was Mr. Brammeier engaged then
16 by the City of Desologe?

17 A. Yes, he was.

18 Q. Does Desologe have its own highway and
19 traffic engineer or planner?

20 A. No, we do not.

21 Q. So if Desologe has issues regarding its
22 streets, the design of streets, safety issues,
23 you have to go to outside parties to get that --

24 A. Correct.

25 Q. -- advice? I didn't finish my sentence.

1 A. Sorry.

2 Q. And the City you mentioned had had some
3 previous familiarity with Mr. Brammeier and his
4 employer; is that right?

5 A. Correct.

6 Q. What was the nature of that familiarity?
7 Can you talk about what projects, say the last
8 project he did for the City.

9 A. I touched on it briefly. There's a
10 process that communities go through when working
11 with the Missouri Department of Transportation
12 that requires you to essentially have a hierarchy
13 of projects that are submitted to the county
14 authority which goes to the regional planning
15 authority which goes to MoDOT. And in order for
16 us to make a case with MoDOT in reference to
17 reconstruction of Missouri Highway 8, which is
18 known as Desologe Drive also in town and State
19 Street, we used Mr. Brammeier's firm to help us
20 with that.

21 Q. Okay. And how long ago was that
22 roughly?

23 A. About 12 years ago.

24 Q. Okay. What did Mr. Brammeier do then in
25 response to the particular engagement related to

1 the issue concerning pedestrians in the roadway
2 for solicitation or distribution purposes?

3 A. He came to Desologe, spent a
4 considerable amount of time in Desologe analyzing
5 intersections, roadways and the structures that
6 are in and around the roadways, obviously storm
7 drainage structures, curbs, sidewalks, so he
8 provided us with a fairly comprehensive analysis
9 of all the roadways within Desologe.

10 Q. All right. And did he deliver a written
11 report to the City of Desologe?

12 A. Yes, he did.

13 Q. I've handed you what's been marked as
14 Exhibit 4. Can you describe what that is?

15 A. This is the report we received from
16 David Brammeier, Final Analysis of Safety Risks
17 Associated with Solicitation and/or Distribution
18 By Pedestrians in the Roadways.

19 Q. What's the date of that report?

20 A. July 17th, 2013.

21 Q. Did you receive that report shortly
22 after that particular date?

23 A. Yes, I did.

24 Q. Is this -- Plaintiff's Exhibit 4 a true
25 and accurate copy of the report from

1 Mr. Brammeier that you -- that the board of
2 aldermen considered in response to that
3 engagement?

4 A. Yes, it is.

5 Q. Once you received this report, what did
6 you do with it relative to the board?

7 A. It was distributed to the board of
8 aldermen for their review -- the mayor and the
9 board for their review at that time.

10 Q. All right.

11 MR. YOUNG: Your Honor, I'd offer --
12 well, I can wait. I'll offer it into evidence
13 when Mr. Brammeier is here.

14 THE COURT: All right.

15 BY MR. YOUNG:

16 Q. What steps did the City of Desologe then
17 take upon receiving this report and the board
18 having been obtained copies of it?

19 A. After consideration the board directed
20 me to direct legal counsel to work on an
21 amendment to the initial ordinance.

22 Q. All right. And then -- so prior to
23 passing any additional ordinance on the subject
24 of pedestrian safety in the roadways did the
25 board of aldermen rely on Mr. Brammeier's report?

1 A. Yes, sir.

2 Q. Was an amendment ordinance passed?

3 A. Yes, it was.

4 Q. All right. I've handed you what's been
5 marked as Exhibit 5. Can you identify that for
6 the Court?

7 A. This is the amended ordinance 2013.09.

8 Q. And when the board passed it, what
9 effect did it have on the initial ordinance
10 that's marked as Exhibit 1?

11 A. It replaced it.

12 Q. And did it repeal it?

13 A. Correct.

14 Q. Okay.

15 MR. YOUNG: Your Honor, I offer into
16 evidence -- well, I guess Exhibit 5 is already in
17 evidence with you in a different form.

18 MR. ROTHERT: It's already in as
19 Exhibit E.

20 MR. YOUNG: Okay. Thank you.

21 THE COURT: Okay.

22 (Defendant's Exhibit No. 5,
23 Ordinance, was received.)

24 MR. YOUNG: It's already in
25 evidence.

1 BY MR. YOUNG:

2 Q. So then when was this ordinance passed?

3 A. Oh, August 12th of this year.

4 Q. All right. So let me direct your
5 attention specifically to the language of the
6 amended ordinance. Does the amended ordinance
7 include language about why the board passed it?

8 A. Yes, it does.

9 Q. Why was that language included?

10 A. We wanted to make sure that we were very
11 deliberate in letting everyone know the specific
12 reasons as to why the ordinance was being
13 enacted.

14 Q. All right. Why does the amended
15 ordinance contain the language that it does in
16 the sections on prohibition and solicitation --
17 I'm sorry, the prohibition of solicitation and
18 distribution? Did you understand that? I
19 butchered that question.

20 A. No. Could you rephrase.

21 Q. Yeah. So why does the amended ordinance
22 contain language it does, say, in Section 1 on
23 the prohibition of solicitation? Next I'll ask
24 you about the language in the distribution
25 section.

1 A. The -- specific to solicitation these
2 were the types of solicitation that we were
3 familiar with. These were the types that we had
4 seen demonstrated most often in the City of
5 Desologe. They were also the types that with the
6 advice of legal counsel had been, I guess,
7 reviewed by the Court and had been upheld at that
8 time, so those were the types that we felt were
9 uncomfortable with because those were the types
10 we were trying to address and, two, the types
11 that we felt that there was a legal precedent
12 that allowed us to put that in there.

13 Q. Okay. And then with regard to the
14 provision on distribution why was the language
15 there chosen with regard to distribution?

16 A. For the same reasons. For the same
17 reasons.

18 Q. Okay. So does the amended ordinance
19 make a distinction between roadways and
20 sidewalks?

21 A. Yes, it does.

22 Q. In fact, it defines them separately;
23 correct?

24 A. Correct.

25 Q. And does the amended ordinance make a

1 distinction between solicitation and
2 distribution?

3 A. Yes, it does.

4 Q. And does it spell out what those are?

5 A. Yes, it does.

6 Q. Where does that appear?

7 A. It's in the second paragraph
8 specifically defining solicitation of rides,
9 employment, business, or sales and charitable
10 contributions by a person within the roadway.
11 And then also farther down distribution of
12 anything by a person within the roadway to an
13 occupant of a vehicle involving the exchange
14 between the person in the roadway and the
15 occupant of the vehicle on the roadway.

16 Q. All right. So why did the City prohibit
17 both solicitation and distribution by a
18 pedestrian within the roadway?

19 A. Obviously, the recommendation from
20 Mr. Brammeier stating that pedestrians in the
21 roadway is just a dangerous -- a dangerous
22 combination, that we wanted to try to prevent
23 them from getting hurt.

24 Q. Okay. Where in the City of Desloge
25 other than in the roadways can the Plaintiffs

1 solicit or distribute without fear of being
2 stopped or confronted about distributing any
3 leaflets or handbills?

4 A. Any sidewalk. In fact, the ordinance
5 here specifically says that nothing contained
6 herein is intended to prohibit solicitation or
7 distribution by any person on a sidewalk, also
8 among persons in a city parking lot or city park.

9 Q. And so the Court is familiar, she's seen
10 some photographs, but are there sidewalks
11 throughout Desologe?

12 A. Yes, there are.

13 Q. Are there other areas where the
14 distribution of leaflets can be taken other than
15 the roadway?

16 A. Any public property. The library. In
17 front of city hall on the city hall property in
18 its parking lot. Within inside the city park at
19 Brightwood Park, our baseball complex, they would
20 be more than welcome to do that, yes.

21 Q. In fact, is the City in the process of
22 actually setting up some trails that would be
23 public, and so additional availability would
24 be --

25 A. We have two trails that we've been able

1 to fund with federal highway money, and we're in
2 the process of building a third, yes.

3 Q. Okay. Is there any ordinance or any
4 reason why the Plaintiffs the Ku Klux Klan here
5 would be inhibited from distributing anything
6 they wanted in any of those other alternative
7 areas?

8 A. No.

9 Q. Can they carry signs in those areas?

10 A. Yes.

11 Q. So where are the only areas within
12 Desologe where the KKK would be restricted from
13 distributing leaflets?

14 A. By the ordinance it wouldn't just be the
15 KKK, but basically as defined the roadway by the
16 ordinance.

17 Q. And that's the point I wanted to make.
18 The ordinance doesn't specify the KKK. The
19 ordinance applies equally to everyone; is that
20 correct?

21 A. Correct.

22 Q. All right. A question arose regarding
23 what impact or effect the passage of the amended
24 ordinance Exhibit 5 had on the initial ordinance
25 Exhibit 1; is that correct?

1 A. Correct.

2 Q. Did the City decide to take some action
3 with regard to making clear on the record what
4 the status of the initial ordinance was?

5 A. Later in the month of August we passed a
6 resolution making that clear that the initial
7 ordinance had been repealed and replaced by the
8 amended ordinance earlier that month.

9 Q. I've handed you what's been marked as
10 Defendant's Exhibit 6: Is that a copy of that
11 resolution?

12 A. Yes, it is.

13 (Defendant's Exhibit No. 6,
14 Resolution, was identified.)

15 BY MR. YOUNG:

16 Q. And it makes it very clear that the
17 initial ordinance marked Exhibit 1 here is in
18 repeal; correct?

19 A. Replaced and repealed, correct.

20 MR. YOUNG: I'd offer into evidence
21 Exhibit 6, Your Honor.

22 THE COURT: Any objection?

23 MR. ROTHERT: Which one was Exhibit
24 6?

25 THE COURT: The resolution.

1 MR. YOUNG: The resolution.

2 MR. ROTHERT: No objection.

3 THE COURT: Exhibit 6 will be
4 admitted into evidence.

5 (Defendant's Exhibit No. 6,
6 Resolution, was received.)

7 BY MR. YOUNG:

8 Q. Finally, does Desologe have an ordinance
9 that speaks to the board of aldermen's intent on
10 severability of paragraphs and sections within an
11 ordinance if there is a declaration of its
12 invalidity?

13 A. It's in our general governmental code,
14 correct, and it's included in the heading of all
15 of our ordinances when they're read, the
16 severability, and, of course, the severability
17 clause.

18 Q. Let me hand you what's been marked as
19 Exhibit 7. Is that a copy of the adopting
20 ordinance that you just made reference to?

21 A. Correct.

22 (Defendant's Exhibit No. 7, Adopting
23 Ordinance, was identified.)

24 BY MR. YOUNG:

25 Q. And is there in Section 9 on the last

1 page of that ordinance a paragraph regarding the
2 severability and the City's intention with regard
3 to that?

4 A. Correct.

5 MR. YOUNG: I offer into evidence
6 Exhibit 7.

7 THE COURT: Any objection?

8 MR. ROTHERT: I guess my objection
9 is to -- on page 9 I don't know if this is
10 currently part of the code or if it's currently
11 in effect.

12 MR. YOUNG: I can ask those
13 questions.

14 MR. ROTHERT: Can you lay a little
15 more foundation?

16 MR. YOUNG: I can ask those
17 questions.

18 THE COURT: Go ahead and lay your
19 foundation for it.

20 BY MR. YOUNG:

21 Q. I'll hand you Exhibit 7, Mr. Camp. Is
22 this particular adopting ordinance the operative
23 and current adopting ordinance that is in the
24 code for the City of Desologe?

25 A. Yes, it is. Yes, it is.

1 MR. YOUNG: I'll offer Exhibit 7.

2 MR. ROTHERT: Then I have no
3 objection.

4 THE COURT: All right. Exhibit 7
5 will be admitted.

6 (Defendant's Exhibit No. 7, Adopting
7 Ordinance, was received.)

8 MR. YOUNG: I have no further
9 questions of this witness at this time.

10 THE COURT: All right. You may
11 cross-examine, Mr. Rothert.

12 CROSS-EXAMINATION

13 BY MR. ROTHERT:

14 Q. Good afternoon, Mr. Camp.

15 A. Good afternoon.

16 Q. I'm going to start by talking a little
17 bit about Ordinance 23.04. That's the one that
18 was passed in April of 2013; correct?

19 A. Correct.

20 Q. And did that ordinance go through the
21 regular process you described of being authored,
22 reviewed by counsel and then passed?

23 A. Yes, sir.

24 Q. Now, you said you felt that you needed
25 to suspend operation of ordinance 2013.04. why

1 did you -- why did you feel that you needed to
2 suspend operation of it?

3 A. It was brought to our attention that
4 there was some concern or question about the
5 definitions that are contained within it.

6 Q. Okay. Was there anything else that made
7 you think that you should suspend it?

8 A. We were contacted by -- our counsel was
9 contacted by your office, so that was part of
10 that attention process.

11 Q. Anything else?

12 A. No.

13 Q. Okay. Did you -- did the Plaintiffs in
14 this case give you anything in exchange for
15 suspending the enforcement of Ordinance 2013.04?

16 A. We -- if I remember correctly, there was
17 an agreement that we would withhold enforcement
18 of the ordinance -- we would hold it in
19 abeyance -- while the parties were allowed to
20 have time to take a closer look at the process.

21 Q. Okay. Well, is it your understanding
22 that the Plaintiffs also withdrew their motion
23 for contempt against the City?

24 A. Correct. Correct.

25 Q. And that was part of the reason why you

1 suspended it?

2 A. That was part of -- I wouldn't say it
3 was part of the reason, but it was certainly part
4 of the process.

5 Q. Turning to Ordinance 2013.09, which is
6 Plaintiff's Exhibit V, but I think you have it
7 there --

8 A. It's 5.

9 Q. -- as Defendant's Exhibit 5. We'll just
10 use the Defendant's Exhibit. Could you read for
11 me how roadway is defined.

12 A. A portion of a public street, road or
13 highway improved, designed or ordinarily used for
14 vehicular traffic and extending from one curb or
15 edge of pavement to the opposite curb or edge of
16 pavement, including lanes commonly used for
17 parking and including center medians and lane
18 dividers.

19 Q. All right. And in this version could --
20 I guess Plaintiff's B3 -- could you read that for
21 me.

22 A. The solicitation described in
23 subparagraph 1 and the distribution described in
24 subparagraph 2 are each permissible to an
25 occupant of a non moving vehicle on the roadway

1 adjacent to the sidewalk and if the person doing
2 so is on the adjacent sidewalk.

3 Q. Now, that was not the original version
4 of this -- there was an earlier draft of this
5 ordinance, was there not?

6 A. Not that I recall.

7 Q. Okay. And in particular there's an
8 earlier draft of that Section 3 that you
9 described?

10 A. Not that I recall.

11 Q. Isn't it true that it used to end at the
12 word sidewalk?

13 A. Maybe in the --

14 Q. And if the person doing it is on the
15 adjacent sidewalk was added?

16 A. I don't recall. It may have been in the
17 04 -- the 2013.04 ordinance. I'd have to look.
18 But it's certainly not in this one.

19 Q. No. I mean, in an earlier draft of this
20 ordinance.

21 A. Oh, in a draft of this ordinance?

22 Q. In a draft one before it was enacted.

23 A. No.

24 Q. Okay. Have you ever heard of a
25 publication called The Daily Journal?

1 A. Yes.

2 Q. And what is that?

3 A. It's the newspaper for St. Francois and
4 surrounding counties.

5 Q. Okay. I'm going to hand you Plaintiff's
6 Exhibit W. On Plaintiff's Exhibit W can you turn
7 to W\D, Exhibit D to Exhibit W, a news article.
8 Do you see that?

9 A. What section now?

10 Q. It's labeled -- I think it's labeled
11 Exhibit W\D.

12 A. D. Sure.

13 Q. And can you tell what that is, if you
14 know?

15 A. It appears to be a copy off the online
16 addition of The Daily Journal of an article done
17 on an ordinance or I assume the August ordinance
18 in Desloge.

19 Q. And what's that article -- what's the
20 date on that?

21 A. It looks to be August 14th.

22 Q. All right. Have you read that article
23 before or seen it?

24 A. I have seen it, yes.

25 Q. And, if you would, turn to the second

1 page -- I think it's the second page -- where it
2 lists the ordinance, where it sets forth the
3 ordinance: Do you see that?

4 A. Uh-huh.

5 Q. Okay. And is that the ordinance that
6 was passed that appears in the newspaper?

7 A. No, it's not.

8 Q. Okay. Can you tell me how it's
9 different?

10 A. Section -- it looks like Section 3 --
11 it's hard to tell here. It appears that Section
12 3 is different.

13 Q. And how is it different?

14 A. It doesn't read the same as the
15 ordinance.

16 Q. Okay. In what way does it not read the
17 same?

18 A. Well, solicitation described -- the
19 first two lines appear to be correct. On the
20 roadway adjacent to the sidewalk or by and among
21 persons in a city parking lot or city park is
22 different.

23 Q. Okay. All right. So in that version --

24 A. This isn't a version of the ordinance.

25 Q. Okay. Is that a copy of a previous

1 draft?

2 A. No.

3 Q. Do you have any idea where the newspaper
4 would have come up with close but not the same?

5 MR. YOUNG: Objection, Your Honor.
6 This is hearsay.

7 THE COURT: Sustained.

8 MR. YOUNG: You would have to ask --

9 THE COURT: He just stated that it's
10 not a draft of the ordinance. I don't know.

11 MR. ROTHERT: Okay.

12 BY MR. ROTHERT:

13 Q. Did you -- did the City ever consider as
14 part of passing this ordinance allowing people to
15 enter the roadway to hand something to a non
16 moving vehicle?

17 A. I think we tried to address that as best
18 we could. Obviously, the paragraph that
19 addresses the occupant of a non moving vehicle on
20 the roadway adjacent to the sidewalk and also to
21 provide or make a provision for that any person
22 on a sidewalk or among persons in the city
23 parking lot or city park.

24 Q. As part of your duties you're familiar
25 with the code of ordinances in Desologe; correct?

1 A. I'm sorry, Say that again.

2 Q. You're familiar with the code of
3 ordinances in Desologe, the ordinances that are
4 in effect?

5 A. Yes.

6 Q. Is there a penalty for violating an
7 ordinance of the City of Desologe if there's a
8 default if there's not a penalty set forth in a
9 particular ordinance?

10 A. There's a standard misdemeanor clause,
11 yes.

12 Q. And what would be the penalty for a
13 violation of an ordinance where there's not one
14 specified in the particular ordinance?

15 A. Each singular violation is punishable by
16 90 days and/or -- 90 days in jail and/or a \$500
17 fine.

18 Q. When you hired a consultant, what did
19 you ask him to do?

20 A. I asked him to take a look at all the
21 roadways in Desologe and consider whether or not
22 it is or is not safe for pedestrians to be within
23 the roadway.

24 Q. And did you limit pedestrians from being
25 in the roadway in any other way other than by

1 solicitation or distributing?

2 A. Specific to this ordinance just for
3 solicitation or distribution.

4 Q. Oh, so you only asked him about
5 distribution and solicitation?

6 A. Correct.

7 Q. You still -- do you still allow crossing
8 guards to enter the roadway?

9 A. Yes.

10 Q. Why if one has been hit?

11 A. For the benefit of allowing the children
12 to cross carefully and safely get across the
13 roadway.

14 Q. Okay. So you had to balance the risk
15 that someone might be hit and someone actually
16 has been with the benefit that comes from having
17 a crossing guard; correct?

18 A. We certainly want to do everything
19 possible to make sure that the children are safe
20 crossing the street.

21 Q. Are you familiar with -- with Section
22 355.090 of the code of ordinances?

23 A. Not off the top of my head, no.

24 Q. Are you aware of a provision of the code
25 of ordinances that allows the City traffic

1 engineer to determine and designate places where
2 vehicles cannot stand, stop or park, because they
3 would cause a hazardous situation or a delay to
4 traffic?

5 A. There is a provision in the code for
6 that, yes.

7 Q. So that would require the City to look
8 at specific intersections and make a
9 determination if there needed to be a prohibition
10 on standing, stopping and parking; correct?

11 A. Since the City does not have a specific
12 inhouse traffic engineer, it would require us to
13 contract with someone as we did with
14 Mr. Brammeier to look at that particular
15 situation, yes.

16 Q. Okay. So the City has given itself
17 authority to make a decision on an intersection
18 by intersection basis where parking and standing
19 are prohibited; correct?

20 A. Correct.

21 Q. And you've exercised that power;
22 correct?

23 A. Correct.

24 Q. Are you familiar with the provision of
25 the code section 315.140 that allows the City to

1 designate crosswalks and safety zones for
2 pedestrians?

3 A. That is in there, yes.

4 Q. And that requires the City to look at
5 particular intersections and decide whether or
6 not to put a crosswalk or a safety zone there;
7 correct?

8 A. A crossing -- yes, correct.

9 Q. And the City has exercised that
10 authority and has put in crosswalks?

11 A. There are crosswalks in Desologe, yes.

12 Q. Is there ever a time in according to the
13 ordinances when a street is actually a sidewalk
14 in Desologe?

15 A. A street would be a sidewalk?

16 Q. Where a street would fit the definition
17 of a sidewalk.

18 A. Not that I'm aware of, no.

19 Q. There are areas in Desologe that don't
20 have sidewalks; correct?

21 A. There are.

22 Q. And isn't it true that there's a
23 provision in your code that -- that defines --
24 creates a right of pedestrians to use walking
25 along the roadway in lieu of a sidewalk when

1 there is no sidewalk?

2 A. There is a portion of the code, but I
3 would refer, again, to the ordinance that we
4 passed in August, which for the purpose of that
5 ordinance defines those areas very specifically.

6 Q. Okay. So I'm going to hand you
7 Plaintiff's Exhibits K and J in the interest of
8 time. Plaintiff's Exhibits J and K, that's 399
9 West Oak; right?

10 A. This is the -- both are pictures of the
11 area of P Highway or West Oak in front of the VFW
12 hall, yes.

13 Q. Okay. And can you tell me for purposes
14 of the -- of the ordinance that we're talking
15 about here today where would someone be able to
16 stand to hand out a leaflet to a non moving car?

17 A. There's a sidewalk across the street.

18 Q. So they would not be allowed anywhere on
19 that side of the street or on the right looking
20 at the picture to the right side of the street?

21 A. That's a private parking lot owned by
22 the VFW. They could get permission from the VFW
23 to do that.

24 Q. What about from the section of the --
25 where the travel portion ends to the grass on

1 both those pictures, what is that?

2 A. That is the shoulder of the road.

3 Q. Okay. And that belongs to the City?

4 A. That is all State right of way. It
5 doesn't belong to the City.

6 Q. Okay. So is someone allowed to stand
7 there and distribute literature on the shoulder?

8 A. On the shoulder?

9 Q. Yes.

10 A. No. They would be able to stand on the
11 corner here of Chadrick and Oak Street or on the
12 sidewalk across the street.

13 Q. Now, in an area on the right side of
14 that road -- that same side that the VFW is on --
15 isn't it true that your ordinances allow
16 pedestrians to walk on the edge of the roadway?

17 A. Again, without seeing the specific
18 ordinance, but there are -- there's accommodation
19 for that. There's also accommodation across the
20 street for them to be able to walk safely with
21 the sidewalk.

22 Q. Okay. But you do have an ordinance
23 section 345.080 that does allow an accommodation
24 where there's no sidewalk?

25 A. Correct.

1 Q. And you'd agree on J and K on the VFW
2 side of the street there's no sidewalk; correct?

3 A. Correct.

4 Q. In Desologe it is lawful for an
5 individual to hand a leaflet to a second person
6 on a sidewalk; correct?

7 A. Correct.

8 Q. If that second person receives the
9 leaflet and throws it on the ground, are they
10 breaking the law?

11 A. There is a littering ordinance in the
12 City of Desologe.

13 Q. And who would be breaking the law --

14 A. The person --

15 Q. -- the first person or the second
16 person?

17 A. The person that would discard the paper.

18 Q. Desologe also has an ordinance that
19 requires drivers to exercise care and to take the
20 responsibility for avoiding any collision with
21 any pedestrian on any roadway; isn't that true?

22 A. That's just standard traffic law,
23 correct.

24 Q. And you've enacted that in the code of
25 ordinances for Desologe?

1 A. Correct.

2 Q. Under your ordinances, as you understand
3 it, is someone allowed to enter the roadway to
4 place a leaflet on a parked car?

5 A. Are they parked on private property or
6 public property?

7 Q. Well, let's say public.

8 A. Public property?

9 Q. Yes.

10 A. The car is parked?

11 Q. Yes, parked.

12 A. Then there's nothing that would prohibit
13 them from doing that.

14 Q. So an individual could enter the roadway
15 and place the -- enter and place a leaflet on a
16 car parked on the shoulder?

17 A. As the ordinance states, a parked car
18 adjacent to the sidewalk in a parking area, say
19 in front of the library where there are parking
20 areas directly adjacent to the curb, they would
21 be able to place something directly on their
22 windshield, correct.

23 Q. What about on the shoulder in front of
24 the VFW?

25 A. A parked car on the shoulder?

1 Q. Yes.

2 A. Are they approaching it from the corner
3 of Chadrick and Oak Street there?

4 Q. I'm asking if they can enter onto the
5 shoulder to place it on a parked car parked on
6 the shoulder?

7 A. The ordinance provides that they can do
8 so from the edge of the -- the edge of the
9 roadway, basically the curb or the sidewalk, on
10 the parked car, yes. So if we're going to define
11 the edge of the roadway there as the shoulder --

12 Q. Uh-huh.

13 A. -- the grassy area adjacent to it, they
14 would be able to stand there and place something
15 on a parked car.

16 Q. Now, turning back to Exhibit 5, I
17 believe, the ordinance 2013.09.

18 A. Yes, sir.

19 Q. What's -- could you read Section 2
20 there that says -- well, let me read it to you.
21 It says, No person shall stand in or enter upon a
22 roadway for the purpose of distributing anything
23 to the occupant of a vehicle; correct?

24 A. Correct.

25 Q. So your understanding of that is that

1 even just putting something on an unoccupied
2 vehicle violates this provision?

3 A. It doesn't say anything about to the
4 vehicle. It says to the occupant --

5 Q. Okay.

6 A. -- of any vehicle.

7 Q. So what I was asking earlier is if
8 there's a parked car there, there's no one in it,
9 it's on the shoulder of the road, can an
10 individual enter onto the shoulder of the road to
11 put a leaflet like under the windshield wiper of
12 a parked vehicle?

13 A. This ordinance doesn't appear to address
14 that.

15 Q. Okay. Now, if the same car was parked
16 there but there was someone sitting in the
17 passenger seat, would it be lawful for an
18 individual to enter the roadway and hand the
19 leaflet to the occupant?

20 A. Section 3 does address that.

21 Q. Entering the road --

22 A. A non moving vehicle on the roadway
23 adjacent to the sidewalk if the person is doing
24 so on the adjacent sidewalk.

25 Q. Okay. But my question was if someone

1 enters the roadway -- enters the shoulder to hand
2 the leaflet to the occupant of a parked vehicle,
3 is that permitted or not?

4 A. They are able to hand something to
5 someone adjacent to the sidewalk if the person
6 doing so is on the adjacent sidewalk.

7 Q. And my question is if they're not on the
8 adjacent sidewalk, they're entering the roadway,
9 is that allowed?

10 A. This ordinance doesn't address that.

11 Q. You don't think they'd be distributing
12 something to the occupant of a vehicle?

13 A. They would.

14 Q. Okay. So the ordinance really does
15 address it, doesn't it.

16 A. It does. In Paragraph 2 it does, yes.

17 Q. I'm going to ask you a question about
18 the solicitation. There were several types of
19 solicitation specified in the ordinance. Is it
20 the City's intention to prohibit all solicitation
21 or just the types that are listed?

22 A. The types that are listed.

23 Q. So is the solicitation of political
24 donations still allowed, you can enter into the
25 roadway for that?

1 A. Yes.

2 Q. What about signatures on a petition?

3 A. It's not addressed in the ordinance. It
4 depends I suppose what the petition would be for.

5 Q. Would it depend? Okay. What petitions
6 would be prohibited?

7 A. Anything that is in here.

8 Q. Okay. I've handed you what's been
9 marked F through U -- Exhibits F through U. And
10 I won't go into too great of detail here to move
11 things along, but I'm just quickly going to ask
12 you where you think someone is allowed to be in
13 these pictures.

14 Exhibit F, isn't that a picture of the
15 corner of North Lincoln and Locust near city
16 hall?

17 A. It is. That is at city hall, correct.

18 Q. Okay. And on the right side of the
19 street looking at the picture on the right can
20 you tell me where someone would be able to -- is
21 there any portion of the roadway someone would be
22 able to enter in there if they wanted to hand
23 something to someone at the stop sign?

24 A. From the sidewalk they would be able to
25 do so. There are also parking areas directly in

1 front of city hall where they would be able to do
2 so.

3 Q. well, I'm concerned about people at the
4 stop sign for now.

5 A. Oh, at the stop sign?

6 Q. At the stop sign. So they would have to
7 stand on the sidewalk and reach over?

8 A. They would.

9 Q. Okay. Exhibit G, that's the corner of
10 Lincoln --

11 A. Lincoln and Chestnut.

12 Q. -- and Chestnut?

13 So do you see there's a gap between the
14 sidewalk and the stop sign. If I wanted to hand
15 something to someone or distribute something to
16 someone at the stop sign, could I enter into that
17 gap in between or --

18 A. It's a parking area.

19 Q. It's a parking area?

20 A. That sign that you can't see because you
21 have your back to it, it has a back to you it
22 there is a parking area.

23 Q. So you're not allowed to enter that
24 because that's part of the roadway?

25 A. Correct.

1 Q. And, by the way, I noticed a sign on the
2 stop sign: what does it say?

3 A. No skateboards or roller blades allowed
4 on the sidewalk.

5 Q. Okay. So where do skateboarders and
6 roller bladers go if they're not allowed on the
7 sidewalk?

8 A. They can go to one of the several trails
9 we've constructed in the City --

10 Q. Uh-huh.

11 A. -- which is designed specifically for
12 non motorized traffic.

13 Q. Are they allowed on the roadway there?

14 A. They would be putting themselves at
15 risk.

16 Q. I understand that, but as far as the
17 laws -- the ordinances are concerned they're
18 allowed on the roadway?

19 A. Not that I'm aware of, no.

20 Q. Is there anything in the ordinance that
21 prohibits them from being on the roadway?

22 A. This ordinance?

23 Q. Any ordinance.

24 A. I don't know of one off the top of my
25 head, no.

1 Q. Okay. Exhibit H, that's the front of
2 city hall?

3 A. Correct.

4 Q. 300 North Lincoln; right?

5 A. Correct.

6 Q. What is that box?

7 A. It's a bill payment depository.

8 Q. And who owns that?

9 A. The City does.

10 Q. All right. And how does that work?

11 A. Cars are able to pull up into the
12 parking area that's shown in front of the city --
13 in front of city hall and able to make their
14 utility bill payments.

15 Q. Okay. So if I were going to -- you park
16 across the street, and you walk over and pay your
17 bill?

18 A. You can drive right up to it.

19 Q. Well, okay.

20 A. That was the intent, which is why it has
21 the elongated shoot on the one side of it.

22 Q. Well, isn't it on the wrong side of the
23 street for that?

24 A. It can be, yes.

25 Q. Okay. So in practice how do people --

1 do the people drive on the wrong side of the
2 street or what?

3 A. They will move into the parking area and
4 pass it either through their window or through a
5 passenger window.

6 Q. Okay. And do people also park across
7 the street and walk over and put it in?

8 A. They do.

9 Q. Is that legal?

10 A. To walk across the street and pay their
11 utility bill?

12 Q. Yes.

13 A. Yes.

14 Q. But they're standing in the roadway to
15 do that, aren't they?

16 A. Or they step up on the sidewalk and use
17 the other side.

18 Q. Do people stand in the roadway and stick
19 their bills in that slot?

20 A. I don't know if I've seen someone do it
21 or not to be honest.

22 Q. We've already talked about J and K. So
23 if you could skip ahead to exhibit -- Plaintiff's
24 Exhibit L.

25 A. Okay.

1 Q. That's the corner of North Carter and
2 Hawthorne Street; correct?

3 A. Correct.

4 Q. The Baptist church is up there. Is that
5 what's on the left?

6 A. It's the First Baptist Church, correct.

7 Q. All right. So can you tell me if I
8 wanted to hand a leaflet to someone parked there
9 at the stop sign at the corner of North Carter
10 and Hawthorne Street at that stop sign that you
11 see there, where could I stand and do that?

12 A. The area off the roadway.

13 Q. Okay. So where does the road -- I mean,
14 what's your -- where does the roadway begin in
15 your understanding? There's no curb, so --

16 A. Extending from one curb or edge of
17 pavement to the opposite curb or edge of
18 pavement, including lanes commonly used for
19 parking, including center medians and lane
20 dividers. So the edge of pavement. So they
21 could stand if they wanted to between the stop
22 sign and the road, because they're at the edge of
23 the pavement on the grassy area there.

24 Q. Now, that is a parking lane there;
25 correct?

1 A. No. That's a two-lane street. There's
2 not a lot of room to park.

3 Q. But there is a car parked there.

4 A. Your car is parked there, as a matter of
5 fact, yes.

6 Q. Oh, were you spying?

7 A. I saw you going through.

8 Q. Plaintiff's Exhibit M, that is Lincoln
9 and Chestnut?

10 A. Correct.

11 Q. And can you tell me where that stop
12 sign -- if I wanted to hand something to someone
13 at that stop sign where I could stand?

14 A. Well, there's a grassy area in between
15 the trail which goes to a crossing over the
16 railroad and to a bridge over the PA ditch which
17 would be directly adjacent to that stop sign. At
18 the opposite corner you'd be able to stand on the
19 sidewalk as well.

20 Q. Now, on the opposite corner that you
21 brought up there's a part that's kind of yellowed
22 off -- this yellow line -- is that -- is that a
23 median, or do you consider that -- what do you
24 consider that?

25 A. It's a non parking area --

1 Q. Okay.

2 A. -- because of the corner.

3 Q. So since it's a non parking area -- I
4 know you're not allowed in a parking area, but
5 are you allowed in non parking areas, or is
6 that --

7 A. You're not allowed to park in non
8 parking areas.

9 Q. Are you allowed to stand and distribute
10 leaflets?

11 A. It's not defined in the ordinance.

12 Q. Next is Plaintiff's Exhibit N, if you
13 could look at that. Again, my question is the
14 first car that's at the stop sign if I wanted to
15 hand them a leaflet, would I be able to do that?

16 A. No.

17 Q. There's --

18 A. There's a right turn lane there --

19 Q. All right.

20 A. -- that goes down to Chestnut Street.

21 Q. Okay. So that section in between that's
22 lined off, is that -- what do you consider that?

23 A. Well, it's not an area for vehicular
24 travel. We're trying to define the area between
25 the north/south lane and the lane that turns

1 right to go east on Chestnut.

2 Q. If I could ask you to skip ahead to
3 Plaintiff's Exhibit T.

4 A. T?

5 Q. T. T as in Tony. Okay. Looking across
6 the street, is the area where cars are parked, is
7 that considered a parking lane?

8 A. It's a parking area, yes.

9 Q. So you wouldn't be allowed to --

10 A. It's not the edge of the pavement. The
11 edge of the pavement is to the left of that. The
12 edge of the pavement.

13 Q. Okay. So even though it's a parking
14 lane it's not part of the roadway?

15 A. Correct.

16 Q. I'm just curious, are you allowed to
17 play basketball in the roadway in the City of
18 Desologe?

19 A. No, you're not.

20 MR. ROTHERT: If I can have just one
21 moment.

22 THE COURT: Sure.

23 BY MR. ROTHERT:

24 Q. It would be the intention of the City of
25 Desologe to enforce Ordinance 2013.09 starting

1 tomorrow?

2 A. Yes.

3 MR. ROTHERT: I have no further
4 questions.

5 THE COURT: All right. Mr. Young.

6 MR. YOUNG: I have no further
7 questions.

8 THE COURT: All right. You may step
9 down.

10 MR. YOUNG: The Defendant calls Sean
11 Roney.

12 THE COURT: Okay.

13 SEAN RONEY,
14 being produced and sworn, testified as follows:

15 THE CLERK: Please state your name
16 and spell it for the record.

17 THE WITNESS: Sean Roney. S-e-a-n
18 R-o-n-e-y.

19 DIRECT EXAMINATION

20 BY MR. YOUNG:

21 Q. Would you state your name, please.

22 A. My name is Sean Roney.

23 Q. What is your address?

24 A. My home address?

25 Q. Yes.

1 A. 610 South Vandervoort, Desologe,
2 Missouri.

3 Q. Where are you employed? I'm sorry.

4 A. Do you want my employment address?

5 Q. Yes.

6 A. It's 1000 North Desologe Drive,
7 Desologe, Missouri.

8 Q. And who are you employed by?

9 A. Desologe Police Department.

10 Q. What's your position with the Desologe
11 Police Department?

12 A. Corporal.

13 Q. Describe your duties in that position.

14 A. The normal duties as a patrolman would
15 have. I also have supervisory duties within the
16 department.

17 Q. Okay. How long have you had that
18 position?

19 A. Since approximately 2007.

20 Q. Let me direct your attention to
21 April 26th of 2013. Were you on duty that day?

22 A. Yes.

23 Q. Can you describe to the Court what
24 involvement, if any, you had in connection with
25 Mr. Frank Ancona and other members of the Ku Klux

1 Klan in the City of Desologe.

2 A. What involvement on that day?

3 Q. Yes.

4 A. I was notified that there had been
5 members of the KKK at city hall, and I was
6 responding to that area. And while I was
7 responding to that area, I got called away to a
8 possible fight in progress of 20 people. I went
9 to that call first.

10 And then after I left from that call, I
11 responded to the area of city hall.

12 Q. All right. And what, if anything,
13 happened next with regard to any involvement with
14 the KKK?

15 A. As I was at the four-way intersection I
16 watched the group of members from the KKK come up
17 towards my location -- towards the intersection
18 from city hall.

19 Q. What intersection was that?

20 A. It would be Oak Street and Desologe
21 Drive.

22 Q. Okay. And what did you observe?

23 A. They walked up. And as they walked up
24 to that intersection, I seen them separate into
25 groups, and they went on every street corner in

1 that intersection.

2 Q. Okay. All right. And what did you
3 observe next?

4 A. As I yielded to make a left turn to go
5 into Oak Street from Desologe, I watched one
6 member approach a truck parked or yielding in the
7 four-way intersection, go to the window, and I
8 seen an exchange of a piece of paper.

9 Q. And did that person go out into the
10 roadway in order to do that?

11 A. Yes.

12 Q. And was that truck a truck that had been
13 moving down the road, stopped at the stop sign
14 and then moved on?

15 A. That's correct.

16 Q. All right. What else did you observe
17 that day?

18 A. I -- at that point that's when I knew
19 that we had this new ordinance in place, so I
20 seen the violation of the ordinance. And so I
21 parked my vehicle at the post office. And then I
22 approached the group, which I knew Frank Ancona
23 was the leader of that, so I approached him, and
24 I initiated contact.

25 Q. All right. And just so the record is

1 clear, let me direct your attention to Exhibit 1.
2 That should be right -- is it right there on the
3 top of there?

4 A. Yes.

5 Q. And is that which is Ordinance Number
6 2103.04 -- is that the ordinance that was in
7 effect that day?

8 A. It appears so, yes.

9 Q. Okay. And that ordinance has since been
10 repealed and an amended ordinance has been put in
11 its place; correct?

12 A. I believe so.

13 Q. I just want it to be clear on the
14 record. So then you saw Frank Ancona. What
15 happened next?

16 A. I told him that we have a new ordinance
17 in place, and what I just observed was a
18 violation of that new ordinance.

19 Q. Okay. And what did he say in response?

20 A. I believe his immediate response was,
21 well, that new ordinance is not constitutional.
22 And then I responded to him saying that's not my
23 place to say one way or the other.

24 Q. What happened next?

25 A. And then at some point we had basically

1 walked down to city hall. I had a mutual
2 agreement to go down there to obtain a copy of
3 this new ordinance. And we went into the city
4 hall building. I asked for the copy, received
5 the copy, gave it to him, and he reviewed it in
6 front of me.

7 Q. And prior to the time before you went
8 down to city hall with Mr. Ancona did you observe
9 other -- the conduct of other members of the KKK,
10 particularly within the roadway?

11 A. Not at that point. After we -- once we
12 left, I didn't observe anything. My back was
13 turned to that group.

14 Q. What I'm really asking is let's say
15 prior to your conversation with Mr. Ancona
16 besides the one person you saw approach a truck
17 did you see anyone else in the roadway?

18 A. I wasn't looking at that point. I was
19 talking to Frank and talking to that specific
20 group.

21 Q. Okay. So did you give him a copy of
22 that Exhibit 1 that was in effect that day at
23 that meeting at the city hall?

24 A. Yes.

25 Q. What happened next then as he left city

1 hall?

2 A. We -- I went over the ordinance with
3 him. I read it, and I focused his attention to
4 the prohibited content, section B of the
5 ordinance. And that's the section where I
6 observed the violation. And he said, well, this
7 is not -- this is not constitutional. Again, I
8 said it's not my place to say that.

9 He said, Are you asking me to leave?
10 And I said, No, I'm not. And then at some point
11 during this conversation I stepped away from him
12 and made a phone call to our chief of police, and
13 I advised him what was going on, what was the
14 content. And he just said basically relay the
15 message we're just asking him to abide by the new
16 ordinance. And once I disconnected from the
17 phone, I said that exact same thing to Frank.

18 Q. Okay. And at any time did you ever make
19 statements to Mr. Ancona or any other members of
20 the Ku Klux Klan that was present that Desologe
21 was going to enforce the ordinance by arresting
22 him?

23 A. There was no statement made about
24 enforcement.

25 Q. How about any mention that they -- a

1 consequence of a violation of the ordinance was
2 led -- could lead to jail or fine?

3 A. There was no discussion of that.

4 Q. After they left you at city hall, did
5 you observe them at all any more that day?

6 A. No, I did not.

7 Q. And since that time have you ever had
8 any occasion to observe any member of the --
9 identified member of the Ku Klux Klan within the
10 City of Desologe?

11 A. There's been no contact since that day
12 from me at all.

13 MR. YOUNG: I have nothing further,
14 Your Honor.

15 THE COURT: All right. Mr. Rothert.

16 CROSS-EXAMINATION

17 BY MR. ROTHERT:

18 Q. Hi. I'm Tony Rothert. I'm one of the
19 attorneys for the Plaintiffs.

20 A. Hello.

21 Q. You had mentioned in your -- at the
22 beginning of your testimony that one of the
23 members handed a leaflet to a truck that was
24 yielding at the intersection. When you say
25 "yielding," do you mean stopped?

1 A. Yes. He was at the stop sign. It was
2 his turn to stop and then progress right, left or
3 straight.

4 Q. Okay. And what are cars -- that's a
5 four-way stop intersection?

6 A. Yes, it is.

7 Q. And what are cars required to do when
8 they approach a stop sign?

9 A. They need to make a complete stop.

10 Q. You had contact with Mr. Ancona back in
11 October of 2012 as well, did you not?

12 A. There was a previous contact. The
13 date -- I don't recall the date, but there was
14 contact.

15 Q. Do you remember telling him that his
16 handing out leaflets to vehicles was soliciting?

17 MR. YOUNG: Objection, Your Honor.
18 That's in relation to the former ordinance that
19 Judge Fleissig has already ruled on.

20 THE COURT: Does -- where are you
21 going with that? Just --

22 MR. ROTHERT: There's no followup
23 question.

24 THE COURT: Okay.

25 MR. ROTHERT: I'm just asking him if

1 he was the one -- he testified he was told that.
2 I'm asking if he's the one that told him that.

3 THE COURT: Okay. I will sustain
4 the objection.

5 BY MR. ROTHERT:

6 Q. In April of 2013 -- April 26th -- you
7 had authority to arrest the members of the Ku
8 Klux Klan and Frank Ancona who you observed
9 violating an ordinance?

10 A. I have arrest authority, yes.

11 Q. Yes. As a police officer?

12 A. Yes.

13 MR. ROTHERT: No further questions.

14 MR. YOUNG: Nothing further, Your
15 Honor.

16 THE COURT: You may step down.

17 MR. YOUNG: I'm getting my next
18 witness from out in the hallway.

19 Thank you.

20 Just so I'm clear, I'm assuming
21 there's no problem with allowing Cpl. Roney to be
22 released to go.

23 THE COURT: Oh, no, everyone can be
24 released or --

25 MR. YOUNG: He needs to get back to

1 town.

2 Come forward and be sworn, please.

3 DAVID BRAMMEIER,

4 being produced and sworn, testified as follows:

5 THE CLERK: Please state your name
6 and spell it for the record.

7 THE WITNESS: David Brammeier.

8 B-r-a-m-m-e-i-e-r.

9 DIRECT EXAMINATION

10 BY MR. YOUNG:

11 Q. would you state your full name, please.

12 A. David Brammeier.

13 Q. And what's your address?

14 A. 1830 Craig Park Court, St. Louis,
15 Missouri.

16 Q. who are you employed by?

17 A. I'm sorry?

18 Q. who are you employed by?

19 A. The traffic and transportation
20 engineering firm of Crawford, Bunte, Brammeier,
21 St. Louis, Missouri.

22 Q. And you may have just touched on it, but
23 elaborate on it please. what's the business of
24 Crawford, Bunte?

25 A. Traffic and transportation engineering.

1 Q. Okay. What's your job with Crawford,
2 Bunte?

3 A. Currently I'm one of the principals.
4 I've been the CEO and president for the last
5 30 years, and I'm transferring down to a little
6 less role.

7 Q. Is that for slowing down for retirement
8 purposes ultimately?

9 A. Yeah, it's looking that way.

10 Q. Describe your specific duties with
11 Crawford, Bunte currently. I'm sure they've
12 changed over the years.

13 A. Well, probably for the last 20 years and
14 I still continue to do marketing. I do traffic
15 studies. I do accident reconstruction for
16 lawyers. And I do a lot of development work for
17 major developers here in the St. Louis area.

18 Q. And how long have you been with
19 Crawford, Bunte, Brammeier?

20 A. I've been with the Crawford firm for
21 42 years. It's been Crawford, Bunte, Brammeier
22 since about 1978.

23 Q. Okay. Would you tell the Court what
24 your educational background is briefly.

25 A. I'm sorry?

1 Q. Can you tell the Court what your
2 educational background is briefly.

3 A. Yes. I have a bachelor of science
4 degree in civil engineering from Southern
5 Illinois University in Edwardsville.

6 Q. All right. And do you have any specific
7 certifications or registrations to professional
8 organizations?

9 A. Yes. I'm a Registered Professional
10 Engineer in the State of Missouri and Illinois.
11 And I'm also licensed as a Professional Traffic
12 Operation Engineer through a program with the
13 Institute of Transportation Engineers. It's an
14 examination certification.

15 Q. Do you have any other specialized
16 training?

17 A. I have work zone safety as part of the
18 International Municipal Signal Association and
19 various other courses in traffic signing, traffic
20 signals and then work zones, work zone safety.

21 Q. And can you describe for the Court what
22 exactly you went through in terms of work zone
23 safety and safety within a roadway type training.

24 A. Yes. The various agencies are always
25 trying to improve on the standards that we apply

1 when we have work in the public highway for the
2 proper and uniform design of signing, striping,
3 flashing lights, whether it's a short term
4 operation, long term operation for the safety of
5 workers.

6 Q. And you mentioned you had some
7 specialized training. What exactly was the
8 training in that particular area for work zone
9 safety?

10 A. In that particular case it was a two- or
11 three-day training course, eight-hour day to be
12 certified in that particular area.

13 Q. And do you hold a certificate in that
14 area?

15 A. Yes.

16 Q. Among others?

17 A. Yes.

18 Q. And who issued that certificate?

19 A. I'm sorry?

20 Q. Who issued that certificate?

21 A. That's issued by what we call IMSA,
22 which is recognized in our business as kind of a
23 standard for the application of traffic control
24 and safety for workers, pedestrians, utility
25 workers.

1 Q. What does IMSA stand for?

2 A. It's the standards for the International
3 Municipal Signal Association.

4 Q. And do you have any other memberships or
5 affiliations in professional organizations?

6 A. Yes. I belong to ITE, which is the
7 Institute of Transportation Engineers. I belong
8 to the local organization here in St. Louis, the
9 TEAM, which is the Traffic Or Transportation
10 Engineering Association of Metropolitan St. Louis
11 and then the IMSA, which I had already
12 referenced.

13 Q. Okay. Describe for me your professional
14 experience over your career.

15 A. For the past 42 years I've provided
16 consulting services to municipalities generally
17 in the Midwest. In this case it would be the
18 State of Illinois, the State of Missouri, City of
19 St. Louis, St. Louis County and most every public
20 agency I'd say east of Jeff City, south of
21 Peoria, west of the Indiana state line in the
22 area.

23 Q. In the normal course of that work do you
24 have to study and analyze and consider highway
25 and traffic safety considerations?

1 A. The bulk of our work has been traffic
2 safety, and most of the improvements that we're
3 asked to identify and recommend is based on
4 accidents and improving traffic flow for drivers
5 and pedestrians.

6 Q. Okay. So describe for the Court how
7 those highway and traffic safety considerations
8 become important in the scope of those regular
9 duties on an ongoing basis.

10 A. Well, often whether it's the State or
11 the County will ask us to look at, say, their top
12 20 intersections where incidents occurred and to
13 make recommendations on how to reduce those
14 incidents, whether it's vehicular accidents
15 whether it's pedestrian. It's just whatever it
16 is.

17 And we've spent 42 years of our life
18 working with various agencies. We've worked with
19 the Missouri Highway Department for probably
20 38 years on what they call a TEAP program, which
21 is the Traffic Engineering Assistance Program,
22 which has virtually taken us into every city in
23 the State of Missouri for the purpose of
24 identifying high accident locations and how to
25 improve them.

1 Q. Have you worked with the City of
2 Desologe previous to your engagement in this
3 instance?

4 A. Yes.

5 Q. In what context have you worked with the
6 City of Desologe?

7 A. A number of years ago -- I made a
8 reference to what I call the TEAP program, the
9 Traffic Engineering Assistance Program, and it's
10 a program provided by the Missouri Highway
11 Department to assist small cities that don't
12 generally have a traffic engineer -- a
13 professional traffic engineer. So any city that
14 requests those services -- and we've worked in
15 the City of Desologe several times over the --
16 since 1973 when the program started. There are
17 various intersections -- a few times we worked
18 with private developers. I believe the Wal-Mart
19 along Desologe Road. There's probably been half
20 a dozen projects since '73.

21 Q. Prior to your most recent engagement by
22 Desologe, when was the last time you worked with
23 the City of Desologe?

24 A. I believe it was about six years ago --
25 five or six years ago at the intersection of

1 Desologe and State Highway 8 to make safety
2 improvements.

3 Q. In 2013 were you engaged by the City of
4 Desologe to make a study regarding the roadways?

5 A. Yes.

6 Q. What were you asked to do?

7 A. I was asked to make an analysis of
8 safety risks that were associated with
9 pedestrians that are soliciting or distributing
10 information along the roadways.

11 Q. All right. When were you asked to
12 perform the analysis in general terms?

13 A. I believe it was sometime in May of this
14 year.

15 Q. Okay. Describe specifically what aspect
16 of traffic and safety you were asked to consider
17 and on which you were asked to provide a opinion
18 and recommendation to the City.

19 A. We were asked to look at and identify
20 issues as they involve the -- and, I'm sorry, we
21 were asked to identify issues and evaluate risk
22 affecting safety of both vehicles and pedestrians
23 in roadways as it relates to distributing or
24 soliciting information.

25 Q. All right. From an overview standpoint

1 just generally can you describe for me what steps
2 you took to further the engagement and end up
3 with an opinion and recommendation on that
4 subject.

5 A. Well, first of all, I thought I had a
6 pretty good understanding of the information that
7 was available on the subject --

8 MR. ROTHERT: Your Honor, I object.
9 The witness appears to be reading from something,
10 and I was wondering if that could be marked as an
11 exhibit or --

12 THE COURT: Yes. Yes.

13 BY MR. YOUNG:

14 Q. So the record is clear, Mr. Brammeier,
15 you've got in front of you what's been marked as
16 Defendant's Exhibit 4; is that right?

17 A. Yes.

18 Q. I'll jump ahead here. From the
19 standpoint of that is that a copy of the report
20 you produced?

21 A. Yes.

22 (Defendant's Exhibit No. 4,
23 Brammeier Report, was identified.)

24 BY MR. YOUNG:

25 Q. And that was produced and delivered by

1 you to the City of Desologe; is that correct?

2 A. Yes.

3 Q. All right.

4 MR. YOUNG: At this time so the
5 record is clean I'll offer into evidence
6 Exhibit 4.

7 THE COURT: Any objection?

8 MR. ROTHERT: My objection is that
9 it's hearsay, but I think hearsay should be
10 allowed in preliminary injunctions, so you should
11 decide what weight to give it.

12 THE COURT: All right. Exhibit 4
13 will be admitted into evidence.

14 (Defendant's Exhibit No. 4,
15 Brammeier Report, was received.)

16 MR. YOUNG: Thank you.

17 BY MR. YOUNG:

18 Q. Mr. Brammeier, so we're clear, I'm
19 asking you questions. Obviously, I don't want
20 you to read from the report.

21 A. Sure.

22 Q. To the extent that you need to refer to
23 something briefly to make an answer to my
24 question do that, but I'm not looking for you and
25 certainly the Court doesn't want to hear you read

1 your report.

2 But I want the Court to understand the
3 process that you went through and ultimately the
4 different stages you took in rendering an opinion
5 and a recommendation to Desologe.

6 A. Yes, sir.

7 Q. I think I asked you from an overview
8 standpoint what did you do in order to ultimately
9 render an opinion and recommendation to Desologe?

10 A. The first thing I did is I consulted all
11 the industry sources that we use in our business,
12 information that would be provided by the
13 Institute of Transportation Engineers,
14 information by the Federal Highway
15 Administration, the Manual on Uniform Traffic --

16 Q. Just so we're clear I don't want you to
17 go into that much. I'm just looking for an
18 overview right now. So you referenced materials.
19 What did you do next? We'll come back to the
20 details of some of those.

21 A. Oh, okay. Excuse me. I researched
22 every reference material I could find relating to
23 the subject.

24 Q. What did you do with respect to the
25 actual roadways in Desologe?

1 A. Eventually I -- I had been to Desologe
2 before, but I wanted to go down and drive the
3 primary highways, the secondary highways, the
4 local roads just to have a feel for the community
5 as it related to what I was looking at.

6 Q. All right. Did you take some
7 photographs while you were there?

8 A. Yes.

9 Q. And do those appear in your report?

10 A. Yes.

11 Q. So we're clear, I think you said you
12 looked at materials first as part of your
13 engagement. And in the engagement you were asked
14 about pedestrians in the roadway, and I wanted to
15 make sure what did you mean by a pedestrian when
16 you used that word in your testimony today and in
17 your report?

18 A. Generally I would define a pedestrian as
19 anybody in the roadway, whether they're crossing
20 the roadway, whether they're a utility worker, a
21 construction worker, a maintenance worker. It's
22 a human being that's in the roadway.

23 Q. Okay. Let me make clear something. At
24 the time that you were asked to get involved in
25 this engagement and at any time before you

1 rendered your opinion and recommendation in
2 what's been marked as Exhibit 4 had you seen a
3 copy of the amended ordinance as it's been come
4 to be known in Desologe or a draft of that
5 ordinance?

6 A. The amended I believe I have.

7 Q. You're talking about before the report?
8 Let me make sure you understand.

9 A. Well, I'm not sure before the report.
10 Okay. The one August 12th, no, I had not seen
11 that.

12 Q. So the record is clear, at any time
13 prior to the making of that report by you and
14 delivering it to Desologe, did you see that
15 version of that ordinance or any draft of that
16 version?

17 A. No.

18 Q. Okay. So in the context of your
19 testimony today and the report what do you mean
20 using the term solicitation in the context of a
21 pedestrian within the roadway?

22 A. Solicitation is simply -- is the handing
23 out information or requesting information and a
24 return of it. It's a two-way -- you hand
25 something out, you get something back. It

1 doesn't always have to be money. It could be
2 information, but both the driver and that person
3 has a function.

4 Q. Okay. And in the context of your
5 testimony today and in the context of the report
6 what did the -- or does the term distribution
7 mean in the context of a pedestrian within the
8 roadway?

9 A. Simply handing information or even
10 discussing verbally with a driver, more of a
11 one-way action.

12 Q. Okay. So talking about your actual
13 engagement process and what you did, what
14 information did you look at first regarding
15 safety of pedestrians on U.S. roadways as part of
16 the engagement?

17 A. One of the things in my research I found
18 was a number of statistics regarding pedestrian
19 deaths and pedestrian accidents, and that was all
20 referenced in my report. I put that in there
21 because quite honestly after 42 years I'm not
22 sure I realized how many pedestrians were being
23 killed at intersections and just how important it
24 was and what an issue it was.

25 Q. And was the source of that the National

1 Highway Transportation Safety Administration?

2 A. Yes.

3 Q. Okay. So after you took a look at the
4 death and injuries that were caused to
5 pedestrians by motor vehicles in the roadway,
6 what information then did you then look at with
7 respect to next in that engagement?

8 A. With respect to what? I'm sorry.

9 Q. What did you do next is what I'm trying
10 to get to.

11 A. After that then I started to assemble
12 all the known information I could find regarding
13 what I call pedestrians in the roadway from every
14 source that I could find that had been noted in
15 that report, which was Federal Highway, ITE, the
16 National Transportation Safety, et cetera.

17 Q. And you also had mentioned -- and we'll
18 come back to some of the details. You also had
19 mentioned that you went and examined the roadways
20 of Desologe even though you were familiar with
21 them; correct?

22 A. Yes.

23 Q. And you put some photos in the report.
24 What types of roads are located in Desologe in
25 the context of your professional categorization?

1 A. Well, first, we would describe U.S. 67
2 as a primary road or an arterial road, which has
3 grade separations, not at grade intersections --
4 interchanges. Second we would describe arterial
5 roads which would be like Desologe Road itself.
6 Second would be major highways, which could be
7 Oak and others. And then, of course, the
8 remaining would be just local roads.

9 Q. All right. Let me go back to --
10 Highway 67 is actually a divided four-lane
11 highway; is that right?

12 A. Yes.

13 Q. And what's the speed limit there?

14 A. I -- it's at least 55 miles an hour.

15 Q. Okay. And then you talked about the
16 next level of roadways. What are those roads?

17 A. That would be the primary or secondary
18 roads, which are not grade separated, local
19 roads, major local roads like Desologe.

20 Q. And what's the -- generally what is the
21 speed limit on those type of roadways within
22 Desologe?

23 A. I believe that road varies from 25 to
24 35. In the CBD it's 25, and outside it's the
25 35-mile an hour.

1 Q. And CBD is the central business
2 district?

3 A. Oh, I'm sorry. Yes. Central business
4 district.

5 Q. Just so we're up with your lingo. So
6 did you also look at intersections within the
7 city?

8 A. I did.

9 Q. And so the Court has something to look
10 to, did you produce a map that appears in your
11 report that's been marked Exhibit 4?

12 A. Yes. It's in Exhibit 4, but it's -- I
13 believe it's Exhibit 1 in the report, yes, sir.

14 Q. Yeah. It's comes right after page 21 of
15 the report; is that right?

16 A. Oh, yes, it does.

17 Q. Okay. All right. And so on that with
18 following the legends you show where signals are,
19 where stop signs are, what's an arterial and
20 what's a primary highway; is that right?

21 A. Yes.

22 Q. All right. And so we talked about what
23 the speed limits are with respect to those.
24 There are other roadways -- so we're clear there
25 are other roadways within Desologe, but they do

1 not -- they do not constitute an arterial or
2 primary roadway, so you didn't include them on
3 the map; correct?

4 A. Yes.

5 Q. All right. In reviewing the roadways in
6 Desologe did you consider safety details relevant
7 to pedestrians who may be within the roadways of
8 Desologe?

9 A. Yes.

10 Q. And specifically did -- what did you
11 consider about specific features of the roadways
12 within Desologe that were relevant on that
13 subject?

14 A. Well, first, you know, I noted that the
15 roadways in Desologe were similar to most
16 communities. I looked for side obstructions. I
17 looked for restrictions in vertical and
18 horizontal curves. I looked for sidewalks,
19 shoulders, the foliage that blocks the view of
20 signage. I looked for sidewalks, graded inlets.
21 Just everything that I have had the experience in
22 40 years of knowing that creates an urban
23 highway.

24 Q. And did you cover those specifics in the
25 portion of the report that's called safety

1 details and Desologe specific factors?

2 A. Yes.

3 Q. And you have reference to exhibits
4 there. Are those -- do those exhibits tie to
5 photos that illustrate the particular factor that
6 you've identified in the paragraph?

7 A. Yes.

8 Q. All right. Rather than go through all
9 the details of those, we'll have the Court -- ask
10 the court to look at that so the Court
11 understands.

12 So then next you talked earlier about
13 the industry material. Explain why the industry
14 materials that you referred to became important
15 in your engagement.

16 A. The industry materials are important,
17 because throughout this country every state is
18 required to adopt a manual. We refer to that as
19 the manual on uniform control traffic devices for
20 streets and highways. Every agency is required
21 to adopt one. The Missouri highway certainly has
22 adopted one.

23 That manual provides in addition to
24 other manuals, but that manual provides the
25 necessary guidelines for engineers or anybody

1 that's preparing a set of plans or construction
2 plans, utility maps, to prepare temporary traffic
3 control plans that are uniform from state to
4 state, so drivers will recognize what they're up
5 against, you know, what they're coming into. Is
6 it a work zone? Is it a utility repair? What is
7 it? But the intent of the uniform manual is all
8 signs and all markings would be uniform.

9 Q. Okay. And so in the context of your
10 review of these materials what steps did you take
11 in order to identify industry materials on
12 professionally approved or recommended conditions
13 or standards that were directed at a location of
14 a pedestrian within a roadway for purposes of
15 solicitation or distribution?

16 A. I researched probably 100 or more
17 various sources, and I was not able to find any
18 information that even used the words solicitor or
19 distributor in a roadway, period.

20 Q. Did you find any materials that
21 identified, recommended or professionally
22 approved standards or conditions that you would
23 employ to allow pedestrians within the roadway to
24 do anything other than cross the street?

25 A. The only thing we identified was the

1 manual on uniform control traffic devices
2 provides for traffic control plans to allow for
3 maintenance and construction workers and workers
4 that are doing incident management in the
5 roadway, and that's it.

6 Q. All right. And so when you say that's
7 what that allows, explain to the Court what
8 exactly do you mean by that. What do those
9 standards basically say about who should be in
10 the roadway from a safety standpoint?

11 A. Well, I think the industry standard
12 recognizes that occasionally you're going to have
13 an incident -- for example, an accident. You
14 could have -- an incident could be anything. It
15 could be an emergency vehicle, EMTs, police, fire
16 that are in the road, and they have to be there.
17 You know, they have to take care of that.

18 So part of the section on the manual
19 describes incident management. The second part
20 describes utility operations. We have a lot of
21 utilities in our roadways in this country. So
22 whether it's renewal, replacement, repair.

23 And the third item is construction and
24 maintenance to repair our roads, to add to them,
25 to widen to them. It's just part of life. And

1 they identify those three different scenarios and
2 only those three.

3 I think what they're saying is if you
4 have to be out on the road, these are the only
5 three people that should be out in the road. And
6 we need to protect them.

7 Q. Okay. And what are the -- can you just
8 describe generally for the Court what the types
9 of professionally approved or recommended
10 conditions or standards that those manuals say
11 apply to those three particular set of facts.

12 A. Well, the standards provide signing and
13 markings for those three type of groups, and
14 that's it. Nothing more than that.

15 Q. Okay. And those groups all are equipped
16 and have that kind of signing and material that's
17 necessary for their jobs that they have to do
18 within the roadway; is that right?

19 A. These groups of people are constantly
20 trained as we are as professional engineers to
21 provide uniform signing for the incident that
22 they're taking care of.

23 Q. And then those -- that signing and those
24 conditions that are approved in these manuals end
25 up being part of the law of the particular area

1 so everyone knows what the -- what conditions and
2 standards should apply to particular instances be
3 it highway workers, be it incident emergency type
4 of responders or utility workers in the roadway;
5 is that right?

6 A. That's correct.

7 Q. Did you find any materials at all in all
8 these materials of your search that allowed for a
9 set of conditions that could be used by a
10 pedestrian to protect a pedestrian in the roadway
11 for any solicitation or distribution conduct?

12 A. I found none.

13 Q. So having found none on that particular
14 point, what consideration, if any, did you give
15 to the industry materials that covered
16 professionally approved or recommended conditions
17 of standards that related to workers maintaining
18 or constructing a roadway or for incident
19 responders or utility workers in the roadway as
20 that might give you some guidance with respect to
21 a pedestrian soliciting or distributing in the
22 roadway?

23 A. I wasn't able to find any reference to
24 any kind of protection that would provide for a
25 pedestrian soliciting or distributing in the

1 roadway.

2 Q. Okay. Describe for the Court just
3 generally some of the specific materials you
4 looked at as part of this process that you just
5 described.

6 A. In my industry and there's books and
7 publications that are used by the Missouri
8 Highway Department that we're required to use in
9 the preparation of plans or development plans for
10 any public project. ITE, which is the Institute
11 of Transportation Engineers, provides a great
12 deal of information on plans.

13 Federal Highway has gone to an extensive
14 trouble of putting together a manual on uniform
15 traffic control devices for streets and highways.
16 In Section 4 of their book they have 44 scenarios
17 for incident management, construction,
18 maintaining, utility work, and that's it.

19 IMSA, which is the institute -- or
20 International Municipal supply -- Signal
21 Association has standards, courses,
22 certifications for engineers and people in this
23 business, and they basically follow the MUTCD in
24 every case. The State of Missouri has adopted
25 the manual. And if you're doing any sort of

1 plans, whether they're roadway widening, utility
2 plan, you're required to follow the MUTCD as the
3 guideline.

4 Q. Now, let me -- so we're clear, describe
5 what the MUTCD is.

6 A. The MUTCD is the Manual on Uniform
7 Traffic Control Devices for Streets and Highways.
8 It is published by the Federal Highway
9 Administration, and every state is required to
10 adopt that manual or a version of it to adapt to
11 their local conditions.

12 Q. All right. So --

13 THE COURT: Mr. Young.

14 MR. YOUNG: Yes, Your Honor.

15 THE COURT: I am sorry to stop you
16 at this point, but I need to take a break.

17 MR. YOUNG: Okay.

18 THE COURT: So we're going to take a
19 ten-minute recess here. I apologize for that,
20 but I realize there's something I have to get on
21 my docket for tomorrow. So I will just be back.
22 It says -- up here it says 2:33, so we'll just
23 start back -- let's start back at 2:50.

24 MR. YOUNG: Okay. Thank you, Your
25 Honor.

1 (Proceedings stood in temporary
2 recess.)

3 THE COURT: Please be seated except
4 for you, Mr. Young.

5 MR. YOUNG: Thank you.

6 BY MR. YOUNG:

7 Q. Mr. Brammeier, are you ready?

8 A. Okay.

9 Q. I think right before our break you were
10 talking about the MUTCD standards. Is there one
11 set of standards that you relied on more than
12 others as part of this engagement?

13 A. The first several in the series of 44 I
14 relied on more. They describe actually work --
15 construction work, utility work, incident
16 management within the shoulder and then outside
17 of the area of the shoulder.

18 Q. Okay. What other factors did you
19 consider as relevant to your analysis of the
20 safety risk associated with a pedestrian involved
21 in solicitation or distribution in the roadway?

22 A. The other part of the information that
23 we discovered or found was the articles dealing
24 with driver behavior and the distracted driver.
25 And I guess I didn't realize myself how

1 distracted drivers are. It's in the world of
2 texting and GPS's and all the kind of other
3 information, but the distracted driver probably
4 is the reason for most of the accidents in this
5 country, and they're all identified in my report
6 on various pages.

7 Q. And is one of the distractions to a
8 driver the unexpected placement of a pedestrian
9 in the roadway as they're driving along roads?

10 A. Yes.

11 Q. So what did you consider was relevant
12 about these identified distractions for purposes
13 of your specific engagement here?

14 A. Well, what was relevant is the driver
15 being distracted is in a 4,000-pound vehicle.
16 The pedestrian is a 200 pound or less generally
17 person. The number of distractions identified by
18 the various industry sources that I utilized is
19 pretty alarming. And the number of fatalities
20 and deaths at intersections associated with
21 distracted driving and all the other things that
22 are happening with distracted driving and texting
23 it's pretty alarming. And so there in and itself
24 is the bulk of the problem is the driver.

25 Q. Okay. So is there anything else we

1 haven't talked about that you utilized in forming
2 your opinion and recommendation to Desologe?

3 A. I can't think of anything else.

4 Q. Okay. In reaching your opinion and
5 recommendation what did you consider the most
6 important factors that led you to come to a
7 conclusion and opinion regarding the safety of a
8 pedestrian involved in solicitation or
9 distribution in the roadway?

10 A. Probably in the information that we
11 found on the number of pedestrians that are
12 killed and injured every year at intersections
13 would be the most important factor.

14 Q. All right. Did you consider what was
15 involved in actually the act of solicitation by a
16 pedestrian within the roadway?

17 A. Well, the mere fact that you're handing
18 out and receiving something or just handing
19 something out, whether you're soliciting or
20 distributing, it's a tremendous distraction to
21 the driver, and it's identified in numerous
22 articles that I found, and two of them are
23 attached to my report, they talk about the
24 distractions to the drivers, and it's just awful
25 serious. It's a serious matter.

1 Q. Did you consider what was involved by a
2 pedestrian involved in the distribution of
3 materials while entering the roadway?

4 A. I believe it to be about the same amount
5 of distraction.

6 Q. Okay. So I think you may have answered
7 this question, but let me ask it this way: How
8 does the time involved in each of the respective
9 activities by a pedestrian within the roadway
10 compare, meaning is the time that it takes to be
11 involved in a solicitation within the roadway
12 versus the time involved in distribution in the
13 roadway impact your decision in any way?

14 A. No.

15 Q. And why was that?

16 A. Because I believe they are both
17 distractions, and neither one of them should be
18 allowed.

19 Q. Okay. And so what -- in summary what
20 did you consider the most important steps you
21 took that allowed you to render an opinion and
22 recommendation?

23 A. When I completed my analysis and I found
24 no information anywhere -- I don't care what
25 source it was -- regarding protection of a

1 pedestrian in the roadway for doing soliciting or
2 distributing, the only information I could find
3 was traffic control plans were temporary for
4 construction workers, utility workers and
5 incident management, I came to the conclusion
6 that there should be no pedestrian in the roadway
7 unless they're in one of those three categories
8 or a pedestrian crossing the road, because that's
9 just part of our environment.

10 Q. So basically what you just described is
11 your opinion that you rendered to Desologe with
12 respect to the safety of pedestrians located
13 within a roadway to distribute or solicit?

14 A. Yes.

15 Q. So what was your recommendation to the
16 City of Desologe?

17 A. My recommendation was not to allow any
18 city official to have to determine a traffic
19 control plan. They're complex enough for
20 professional engineers that have training --
21 continued training on this. So my recommendation
22 was not to allow it in the first place, because
23 they're not a necessary part of the traffic
24 control plan identified by the manual.

25 Q. Well -- and isn't it true that there --

1 as you said, there was no particular standards or
2 conditions that would cover a pedestrian
3 soliciting or distributing in the roadway?

4 A. I could find no information, a standard
5 or not.

6 Q. Okay. So after you completed your
7 report, it was delivered to the City of Desologe;
8 is that right?

9 A. Yes.

10 Q. So after Desologe received the report,
11 what, if anything, did you learn that the City
12 did with respect to its concerns over the safety
13 of pedestrians who would solicit or distribute
14 within its roadways?

15 A. It was shortly after that I was told
16 that they passed the ordinance. I believe it was
17 dated sometime in August.

18 Q. Is that Exhibit 5 before you?

19 MR. ROTHERT: We'll stipulate that
20 it is.

21 MR. YOUNG: Okay.

22 BY MR. YOUNG:

23 A. I don't seem to have it here.

24 Q. All right. So in your opinion from a
25 safety standpoint is there any rational basis

1 supporting a limitation or any kind of a limit on
2 prohibition to specific areas or locations or
3 streets within the city of Desologe for the
4 prohibition on solicitation or distribution in
5 the roadway?

6 A. My recommendation is it should not be
7 allowed at all.

8 Q. Explain your answer why you say that.

9 A. Based on the research information I
10 found regarding the fatalities, the injuries of
11 pedestrians at roadways and based on the
12 standards that apply to my industry, the ones
13 that we are required to follow when we prepare
14 traffic plans for any kind of project, it's
15 clearly stated in Section 4 of the manual of
16 uniform traffic control devices that traffic
17 control plans are identified for three specific
18 areas, and I don't believe a pedestrian in the
19 roadway soliciting or distributing falls into
20 those three categories.

21 Q. Okay. So have you had a chance to
22 review the amended ordinance that was passed by
23 the board of Desologe to address the safety
24 concerns after your report was rendered?

25 A. Yes.

1 Q. I direct your attention to Exhibit 5.

2 A. For some reason I don't see it. Excuse
3 me. I'm sorry.

4 Q. Based on your knowledge of the Desologe
5 roadways and this amended ordinance as you read
6 it, are there any areas that have a non-traveled
7 portion of a roadway as the term roadway is
8 defined in the ordinance?

9 A. No.

10 Q. Explain why you say that.

11 A. Because the travel ways -- in what I
12 found in Desologe either the travel ways or the
13 parking areas are what was pretty much in
14 Desologe, and I think they've covered that for
15 the purpose of this ordinance.

16 Q. All right. In Desologe is the top of
17 the road at the end of the pavement, is that part
18 of the roadway under the definition in the
19 ordinance, or is it outside of the roadway?

20 A. I would actually call it the face of the
21 curb instead of the top of the curb. Actually,
22 the face of the curb would be the edge of the
23 roadway.

24 Q. So the top of the curb would not be part
25 of the roadway; is that right?

1 A. That's correct.

2 Q. Are there any center or
3 middle-of-the-road medians within Desologe based
4 on your review and knowledge of the city streets
5 and roads?

6 A. There's no center-of-the-road medians at
7 all.

8 Q. Are there any parking lanes where motor
9 vehicles do not travel or operate within the City
10 of Desologe?

11 A. No.

12 Q. And so cars are always parking,
13 operating, coming in and out of any of those
14 parking lanes; is that right?

15 A. They can, yes.

16 Q. If there are cars parked within parking
17 spaces, what would be your opinion of the safety
18 risks associated with pedestrians who made
19 efforts to solicit or distribute from parking
20 lanes in between parked cars to motor vehicles on
21 the balance of the roadway?

22 A. Outside intersections -- most accidents
23 involving pedestrians involved backing vehicles.
24 And having pedestrians interfacing with parking
25 areas is extremely dangerous.

1 Q. In your report on page 19 you use the
2 phrase travel way of a public roadway: Do you
3 see that? Page 19.

4 A. Oh, yes.

5 Q. And what did you mean by that?

6 A. What do I mean by that is the area in
7 which the car travels, the area which a car can
8 leave a travel lane and use a parking lane is
9 part of the travel way.

10 Q. Okay. And so at the time you used the
11 term -- this phrase travel way of a public
12 roadway you had not seen any definition of
13 roadway in the new amended ordinance that's
14 marked Exhibit 5; is that correct?

15 A. Yeah. I had never seen the ordinance
16 until it was passed.

17 Q. So as you now look at that definition of
18 roadways in the amended ordinance marked Exhibit
19 5, how would you compare that definition of a
20 public roadway to what you intend to mean when
21 you used the phrase travel way of a public
22 roadway?

23 A. I believe their definition is consistent
24 with mine.

25 Q. So it's one in the same?

1 A. Yes.

2 Q. Based on your knowledge of the roadways
3 within Desologe, is it possible for a pedestrian
4 to distribute leaflets or materials to occupants
5 of stopped vehicles without going out into the
6 roadway where the motor vehicles are being
7 operated?

8 A. No.

9 Q. What could happen if in your opinion --
10 I'm sorry, what could happen in your opinion if
11 Desologe allowed pedestrians to enter into the
12 roadway to solicit or distribute as prohibited in
13 the amended ordinance?

14 A. It's my belief that potentially they
15 could add to the statistics of pedestrian
16 accidents at intersections or fatalities.

17 MR. YOUNG: I have no further
18 questions of the witness.

19 THE COURT: All right. Mr. Rothert.

20 CROSS-EXAMINATION

21 BY MR. ROTHERT:

22 Q. Good afternoon.

23 A. Good afternoon.

24 Q. So it's your testimony that no one other
25 than in three categories should be allowed to be

1 in a roadway that's not in a car?

2 A. That's correct.

3 Q. And what are those three categories?

4 A. Utility workers, construction workers
5 and incident management personnel.

6 Q. Okay. And then you mentioned one
7 exception. What was that?

8 A. Well, a pedestrian is part of our
9 environment. That's a given necessity to cross
10 the street.

11 Q. Why should we make exceptions for
12 pedestrians?

13 A. I don't believe I'm making an exception.
14 A pedestrian is part of our environment. With
15 the other three the guidelines have proven they
16 need to be protected against the distracted
17 drivers, et cetera.

18 Q. Isn't it true that people communicating
19 ideas by handbills and literature in streets is
20 part of our environment as well?

21 A. I don't believe it should be part of it.
22 I think it's a distraction. It's identified in
23 both of the amendments that I have added to my
24 report.

25 Q. But it is part of our -- our environment

1 in the United States. That's a tradition;
2 correct?

3 A. I don't know if it is or not. I'm
4 saying it's a distraction to a driver, and it's
5 identified in both of the add-ons that I have to
6 the report.

7 Q. Should crossing guards be allowed in
8 roadways?

9 A. Should what?

10 Q. Should crossing guards be allowed in
11 roadways?

12 A. Crossing guards certainly have another
13 respect in our society for crossing children, and
14 I think they have come to be respected. They
15 don't generally stand in the middle of the
16 roadway except at times when they are allowing
17 children to cross.

18 Q. So they should be allowed?

19 A. Each community handles it differently,
20 and I do believe they are a safety part of
21 children crossing highways. That's correct.

22 Q. Should pedestrians be allowed to walk
23 along a road where there's no sidewalk, for
24 instance?

25 A. Often there's not a choice.

1 Q. Okay. So should that be allowed?

2 A. I just said there's not a choice to
3 walk.

4 Q. Or is that a distraction?

5 A. A lot of pedestrians are killed along
6 the roadways, and sometimes there's not a choice,
7 because the roadways have been built without
8 accommodations for pedestrians.

9 Q. Should people be allowed to walk on the
10 roadway to get to their cars if the car is parked
11 in a parkway along a road?

12 A. To get to their car: Is that what
13 you're saying?

14 Q. Yes. Yes.

15 A. Well, that's pretty obvious, I think.
16 Yeah, of course.

17 Q. Okay. What about crossing the street --
18 well, let me ask you, if you could look in front
19 of you at exhibit -- Exhibit H. There's a stack
20 of photographs.

21 A. If I have it, I don't see it. Okay.

22 Q. Could you look -- they may not be in
23 order. If you could find H.

24 A. Okay.

25 Q. Do you see that box there?

1 A. I do.

2 Q. Are you familiar with that from your
3 travels to Desologe?

4 A. I did not see that. Or if I did, I was
5 not looking for it.

6 Q. Okay. Can you tell what that is?

7 A. It looks like it's a box to make a bill
8 payment.

9 Q. Okay. Is that safe to have -- to have
10 people walk up and pay their bills?

11 A. I think it's more of a drive-up, isn't
12 it?

13 Q. I don't know. Is it on the right side
14 of the street to be a drive-up?

15 A. It looks to be a drive-up. Again, I
16 think we're confusing a box for a purpose of
17 payment and somebody standing out in the middle
18 of the roadway as a safety issue. Somebody
19 standing in the road in my professional opinion
20 is a safety issue.

21 Q. What about skateboarding in roads,
22 should that be allowed?

23 A. In my opinion probably not.

24 Q. What about riding a bicycle?

25 A. That's part of our -- in general if it's

1 done, you know, for a reason of transportation
2 and not kids zigzagging. I mean, people ride
3 their bicycles in our roadways. And if they
4 follow the same rules and regulations that a
5 motor vehicle does, then it would be certainly
6 expected.

7 Q. What about soliciting petition
8 signatures in the roadway, should that be
9 allowed, go up to a car to ask them to sign my
10 petition?

11 A. My report would not allow that.

12 Q. Now, you were not able to identify any
13 articles that talked about the distribution of
14 literature as a distraction in roadways, were
15 you?

16 A. I could find no article that even talked
17 about anything with distribution or soliciting.

18 Q. Have you heard of complete streets?

19 A. Of who?

20 Q. Complete streets?

21 A. Oh, yes.

22 Q. Can you tell me what that is?

23 A. Well, it's a -- it's a new concept.

24 It's coming across the nation. And its purpose
25 is to make friendly, walkable, rideable streets,

1 but the intent isn't to distribute information in
2 intersections and distract drivers. It's really
3 the intent is just the opposite.

4 Q. well, isn't the intent of the complete
5 streets movement to make streets that are
6 available for multi-mobile use?

7 A. The intent of complete streets is to
8 make them safe and usable for all modes of
9 transportation, and the purpose is really to get
10 the distractions out of the intersections. So
11 it's really just the opposite of what you might
12 think they're for.

13 Q. well, I'm not saying what I think. The
14 idea of complete streets is that streets should
15 be safe and accessible to pedestrians and motor
16 vehicle users and bicyclists; correct?

17 A. The purpose of complete streets is to
18 get the public that we realize today out walking
19 and riding bicycles and provide them safe access
20 across the highway and not to distribute or
21 distract drivers that are in the public roadway.

22 Q. Now, based on your experience, you're
23 able to tell from visiting intersections which
24 ones are more dangerous or less dangerous;
25 correct?

1 A. I probably can't stand there and look at
2 them. No. Statistics would show -- you have to
3 have statistics. You have to have accident
4 reports.

5 Q. Okay. And so did you look at any action
6 reports for any of the intersections in the City
7 of Desologe to determine which ones were more
8 dangerous or less dangerous?

9 A. No.

10 Q. But someone could do that; correct?

11 A. Correct.

12 Q. And did you try to identify -- looking
13 at incident reports couldn't you identify maybe
14 times when intersections were dangerous or not,
15 or are they equally dangerous all the time?

16 A. No. Well, no, they're certainly not
17 equally dangerous all the time. Statistics would
18 indicate that certain times of the night they're
19 more dangerous. During peak hours they can be
20 more dangerous.

21 Q. Are you aware of any -- in your trip to
22 Desologe were you able to identify any traffic
23 congestion problems?

24 A. Congestion is kind of in the eyes of the
25 beholder. What we think in St. Louis is

1 congestion -- smaller communities have a
2 different tolerance for congestion. I was there
3 during peak times, and the traffic backed up six,
4 eight cars. In fact, there's a picture in the
5 report -- one of the exhibits -- that shows
6 accumulating of vehicles at one of the
7 intersections. I probably would not really call
8 it congestion, but it certainly -- smaller
9 communities have a different point of view
10 sometimes.

11 Q. How long did it take you to prepare --
12 to do your work and prepare your report? After
13 you were hired to go into Desologe and visiting
14 and doing the research and drafting your report
15 how long did that take?

16 A. Well, your question is how long did it
17 take to do the report?

18 Q. No. All of it. From the time you were
19 hired, to going down seeing Desologe, taking the
20 pictures, doing the research, writing the report
21 and I'm asking you to state days, weeks, months.

22 A. Oh, it didn't take months. I had a
23 meeting or two with the attorney. I spent a day
24 going to Desologe and driving as many of the
25 streets -- all the primary streets, all the

1 secondary and sampling some of the local roads.
2 And I probably spent a day in doing research
3 certainly looking for information that I never
4 found, as I've already testified to. And then I
5 spent probably another two days putting the
6 reports together with the documentation and the
7 pictures and the two supporting articles on
8 distracted drivers and also researching the
9 manual to make sure that it applied in this case
10 as thoroughly as I expected it to.

11 Q. What attorney did you meet with?

12 A. Mr. Young.

13 Q. Okay. And what was -- what did you
14 discuss at those meetings?

15 A. I'm sorry?

16 Q. That was before you did your report?

17 A. Well, of course, I met with him before I
18 did the report.

19 Q. Okay. What did you discuss?

20 THE COURT: I was expecting
21 something here. I'm sorry. I was anticipating
22 I'll just put it that way. Yes, Mr. Young.

23 MR. YOUNG: Objection, Your Honor.
24 I think this gets into a privileged area of trial
25 preparation. He's clearly an expert witness for

1 Desologe, and I think that what we talked about
2 in terms of engagement and what happened after
3 that is a privileged area.

4 THE COURT: Do you have a response
5 to that?

6 MR. ROTHERT: well, my response
7 would be that he's a third party, not the client
8 and that meetings before his study go to the --
9 go to the reliability of the study.

10 THE COURT: I'm going to sustain the
11 objection.

12 BY MR. ROTHERT:

13 Q. In your review of the literature did you
14 review any literature from the American
15 Association of State Highway and Traffic
16 Officials?

17 A. That's one of the main sources that we
18 use in our business.

19 Q. Okay. And did you find any guidance
20 from the American Association of State Highway
21 and Traffic Officials regarding protecting
22 pedestrian access to roads?

23 A. The book has a lot of guidelines and
24 standards as it relates to vehicles and
25 pedestrians, but there's nothing in that book

1 that addresses solicitors or distributors.

2 Q. And you're talking about a book, is
3 there just one book?

4 A. It's one huge book.

5 Q. Okay. And do you know when that book
6 was published?

7 A. It's published -- it's updated every
8 several years. It's the American Association of
9 State Highway Officials, and the latest one, I
10 believe, is 2012 maybe. It's updated constantly.

11 Q. Okay. And they give other guidance,
12 though, beyond the book; correct?

13 A. They have books and supplements and
14 guidelines, yes, sir, they do.

15 Q. What about the Transportation and
16 Research Board of the National Academies -- of
17 the National Academies?

18 A. They put out so many different
19 publications on this subject that I would need a
20 box to bring them into this courtroom.

21 Q. Well, did you review them?

22 A. I reviewed as many of them as I could,
23 yes.

24 Q. Okay. How many?

25 A. Probably 30.

1 Q. Okay. And out of how many?

2 A. There's hundreds of them.

3 Q. What about the Federal Highway
4 Administration?

5 A. The Federal Highway also publishes
6 numerous books. The main one is the Manual on
7 Uniform Traffic Control Devices For Streets and
8 Highways, particularly Section 4 for
9 construction, utility and incident management.

10 Q. Okay. Did you read the section about
11 pedestrian access to roads?

12 A. I've read most of the book at various
13 times over the 42 years, yes.

14 Q. Okay. But in preparation for your
15 opinion here did you read the section on
16 pedestrian access to roads?

17 A. No.

18 Q. Okay. Did you look at all the streets
19 and intersections in Desologe, or did you limit
20 your --

21 A. I drove all the major highways. I drove
22 all the secondary highways and many of the local
23 roads. I probably could have driven them all in
24 a couple more hours, but there's not that many,
25 but, no, did I drive them all? No.

1 Q. Do you think it would be -- if Desologe
2 limited distributing literature to non moving
3 vehicles, that would be safer than having no
4 regulation; correct?

5 A. I'm sorry, I didn't --

6 Q. If the -- if the exception was for -- or
7 if the rule was that you can't distribute
8 literature except for when the vehicle is not
9 moving, that would be -- would that help with the
10 distraction safety issue?

11 A. How does a vehicle not move unless it's
12 parked?

13 Q. Well, are you familiar with any
14 intersections in Desologe? But let me ask you,
15 can you look at Exhibit G?

16 A. What?

17 Q. Exhibit G that's in front you. It's one
18 of the photos.

19 A. Okay. Which one am I looking at?

20 Q. G.

21 A. G?

22 Q. G.

23 A. Okay.

24 Q. It's the back of a sign, but do you see
25 a sign there that has six sides -- or eight

1 sides?

2 A. It says, No skateboards.

3 Q. Right. Above that.

4 A. Well, it's a stop sign. I assume it is.

5 Q. Yes. And vehicles stop at stop signs;
6 correct? Vehicles stop at stop signs?

7 A. I assume it's a stop sign. I can't see
8 it.

9 Q. Okay. Well are there stop signs in
10 Desologe?

11 A. Most of the stop signs look like that on
12 the back side.

13 Q. But are there stop signs in Desologe is
14 what I'm asking?

15 A. Yes.

16 Q. And do vehicles stop at stop signs?

17 A. Yes.

18 Q. It's safer to distribute literature in a
19 roadway during the daylight than it would be at
20 night; correct?

21 A. I've testified it's unsafe to distribute
22 or to solicit in a roadway where there's
23 pedestrians and vehicles under any circumstances,
24 period.

25 Q. And I heard your testimony. I'm asking

1 if in your opinion it would be safer --
2 relative -- during the day than at night?

3 A. I have not reviewed whether it has been
4 or not.

5 Q. Okay.

6 A. I don't think it's safe to distribute at
7 all at the daylight --

8 Q. I understand.

9 A. Okay.

10 Q. Okay. You don't know if there's any
11 relative difference?

12 A. I haven't researched that, but I'm sure
13 there is.

14 Q. Okay. Do you know is it safe or
15 relatively more safe to distribute literature to
16 motorists who are coming to a stop like at a
17 traffic signal or a stop sign than, you know,
18 somewhere else on the roadway?

19 A. I believe it's not safe to distribute or
20 solicit a pedestrian with a vehicle in a stop or
21 unstopped traffic signal or any portion of the
22 roadway, period.

23 Q. Would it be safer if you're trying to
24 prevent -- the purpose here of this ordinance in
25 your opinion would be to prevent distraction for

1 drivers; is that correct?

2 A. Distraction and injuries.

3 Q. Would it be -- would it prevent
4 distraction and injuries if Desologe banned
5 texting while driving?

6 A. I believe most communities have done
7 that, so --

8 Q. Okay. I wasn't asking if most
9 communities have. I was asking if that would --
10 would that lower distractions?

11 A. Texting has been identified as a
12 distraction to drivers, yes.

13 Q. And there's lots of research on that;
14 correct?

15 A. There's a lot of research on that.

16 Q. But what about using cell phones while
17 driving, there's a lot of research on that, isn't
18 there?

19 A. That's identified in the second addendum
20 to my report also.

21 Q. And there's also quite a bit of research
22 about eating while driving; correct, isn't there,
23 that that's distracting?

24 A. In the second addendum of my report that
25 is also identified among other -- other subjects.

1 Q. And do you have any knowledge of whether
2 Desologe has banned any of those things, texting
3 while driving or using a cell phone while driving
4 or eating while driving?

5 A. I'm not aware of those.

6 Q. Okay. If you could look at Exhibit L,
7 it's another one of those photos.

8 A. L, did you say?

9 Q. L. Yes.

10 A. Okay.

11 Q. Where do you think it would be safe near
12 that stop sign for someone to distribute
13 literature to a car that's stopped at the stop
14 sign?

15 A. There's nowhere on that roadway or on
16 that sign that there would be a place that's safe
17 for anyone to distribute or solicit information
18 at that intersection.

19 Q. Let me ask you to look at Exhibit S.

20 A. I'm sorry?

21 Q. S. Exhibit S.

22 A. S. Okay.

23 Q. Is there anywhere in that picture that
24 would be safe to distribute literature?

25 A. There's nowhere in that intersection as

1 defined by the roadway in my report that would be
2 safe for a pedestrian to solicit or distribute
3 information.

4 Q. And where would you consider the roadway
5 starting?

6 A. The face of the curb to the face of the
7 opposite curb.

8 Q. Okay. And if there's no curb -- do you
9 see a curb in Plaintiff's Exhibit S?

10 A. There is a curb there.

11 Q. Oh, there is?

12 A. And you're looking at Exhibit S?

13 Q. I'm looking at a smaller version. Maybe
14 I'm talking about the wrong one. What about U,
15 Plaintiff's Exhibit U?

16 A. Which one?

17 Q. This is U.

18 A. Yes. Let me -- can I -- is this U? It
19 looks like V to me, but U?

20 Q. Yes.

21 A. Okay.

22 Q. Where would it be safe to stand in that
23 -- U -- and distribute literature in that picture
24 U?

25 A. There would be no place within the

1 roadway to distribute at that location.

2 Q. And where does the roadway begin?

3 A. The roadway in this case would be
4 everything that's paved from one side of the road
5 to the other, and clearly it is the travel way
6 for the vehicles.

7 Q. And you think it's dangerous to
8 distribute literature to vehicles in parking
9 areas park -- where they park along the street
10 too?

11 A. If they're parked on a public street
12 where vehicles have backing maneuvers, it is
13 extremely dangerous.

14 Q. Okay. So do you think it's equally
15 dangerous in parking lots?

16 A. I believe it also occurs in parking
17 lots, but that's a private manner, a Wal-Mart
18 lot, but, yes, it's still --

19 Q. What about a public parking lot like the
20 one in Desologe?

21 A. Backing maneuvers on vehicles make it
22 very dangerous for people to be meandering around
23 a parking lot.

24 MR. ROTHERT: Okay. I have no
25 further questions.

1 MR. YOUNG: I have just a couple
2 more.

3 THE COURT: Okay. Mr. Young.

4 REDIRECT EXAMINATION

5 BY MR. YOUNG:

6 Q. Let me direct your attention,
7 Mr. Brammeier, to Exhibits L and S and U. Now, I
8 want to make sure I understood your testimony.
9 what you were saying is there's no safe place to
10 distribute or solicit from within the roadway in
11 any of those three photographs; is that correct?

12 A. That's correct.

13 Q. It's possible to distribute safely in L
14 from the grass at the edge of the pavement; is
15 that right?

16 A. I believe that would be, yes.

17 Q. And that would be to a car parked on the
18 side of the road; correct?

19 A. Yes.

20 Q. And is that also true in each of S and U
21 that distribution could occur from the grass that
22 shows in the photographs to a parked car on the
23 side of the road?

24 A. A parked car, yes, that would be --

25 MR. YOUNG: Okay. I have no further

1 questions, Your Honor.

2 THE COURT: Okay. You may step
3 down.

4 THE WITNESS: Thank you.

5 MR. YOUNG: I have no further
6 witnesses.

7 THE COURT: All right. Well, do you
8 wish to proceed with argument at this time?

9 MR. ROTHERT: Yes, please.

10 THE COURT: Okay. Your Honor, we
11 can excuse Mr. Brammeier; correct?

12 MR. ROTHERT: Yes.

13 THE COURT: Yes.

14 MR. YOUNG: Thank you.

15 (Plaintiff's Argument.)

16 MR. ROTHERT: May it please the
17 Court. The parties have done quite a bit of
18 briefing on this, so I'm not going to regurgitate
19 everything here. But I'm not intending to
20 abandon any arguments. And any questions you
21 have are fine.

22 I also want to bring to the Court's
23 attention there's a new Eighth circuit case about
24 reversing the denial of a preliminary injunction
25 where someone is prohibited from distributing

1 leaflets at a fair. And that case is Johnson v.
2 Minneapolis Park and Recreation Board. The
3 Eighth Circuit Number is 12-2419. And it was
4 decided on September 11th, 2013. So I read it on
5 my phone at the break, but it seems very close to
6 on point.

7 THE COURT: So there's an Eighth
8 Circuit case that came out today?

9 MR. ROTHERT: Today.

10 THE COURT: Shall we just all take a
11 break and read it right now and -- No. I'm
12 just --

13 MR. ROTHERT: I read it just -- I'm
14 happy --

15 THE COURT: Okay. What was the -- I
16 mean -- okay.

17 MR. ROTHERT: I mean, I think it has
18 some relevance, and I can discuss it. It
19 discusses the Heffron case, and it discusses many
20 of the other cases that we rely on.

21 THE COURT: Okay. All right.

22 MR. ROTHERT: I just got it at the
23 last break and put it on my little phone, you
24 know, and it addresses -- well, it reverses the
25 denial of preliminary injunction to distribute --

1 there it was bibles at a fair. It was the LGBT
2 Pride Fair in Minneapolis.

3 It was found the ordinance was not
4 likely to be found -- or not likely to be
5 narrowly tailored in part because it was under
6 inclusive. It allowed a lot of other
7 distribution activity that would have the same
8 harms that had been identified by the City.

9 And, oh, and the Court also made the
10 distinction between distribution and solicitation
11 and how they're different. So that's the
12 relevance I think of the case obviously.

13 THE COURT: Okay.

14 MR. ROTHERT: It came after we were
15 here. It came out after we were here.

16 THE COURT: All right. Well,
17 obviously, we will all be taking a look at it
18 for --

19 MR. ROTHERT: And I only had a quick
20 look at it.

21 So just very briefly on the former
22 ordinance --

23 THE COURT: Yes, let's talk about
24 standing.

25 MR. ROTHERT: -- the April 1st --

1 for preliminary injunction purposes --

2 THE COURT: Uh-huh.

3 MR. ROTHERT: -- you know, there is
4 a nominal damages claim, and I think that gives
5 standing in the case, because they left -- they
6 left. They stopped their First Amendment
7 activities.

8 But for preliminary injunction
9 purposes, you know, Frank Ancona, who admitted
10 under oath that he violated that ordinance, and
11 the police officer who says he saw him do it, he
12 can still be charged under the ordinance, because
13 he was violating a law that was in effect at the
14 time.

15 Certainly the City could disavow and
16 say they won't do that, and that would take away
17 the prospective harm, but that hasn't happened.

18 THE COURT: Yes, Mr. Young.

19 MR. YOUNG: Given the invitation
20 I'll stipulate that the City will disavow and
21 won't do that, Your Honor. That's not what we're
22 here about, Your Honor.

23 THE COURT: If the City has
24 stipulated that they will not be charging
25 Mr. Ancona for that particular violation, if

1 that's not part of the issue, do you have -- what
2 other support do you have for standing to
3 challenge the earlier ordinance?

4 MR. ROTHERT: well, for preliminary
5 injunction purposes --

6 THE COURT: Right.

7 MR. ROTHERT: -- that would resolve
8 it.

9 THE COURT: Okay.

10 MR. ROTHERT: We do think we have
11 standing in the actual case for a damages claim.

12 THE COURT: Okay.

13 MR. ROTHERT: All right. And
14 standing in general -- you know, I don't know if
15 it's being disputed that there's standing to
16 challenge the second ordinance, but the testimony
17 was that it will be enforced. It does cover what
18 my clients do. And they're not going and
19 distributing literature because of the existence
20 of the ordinance. So I think that's sufficient
21 showing effect to show and it's not unreasonable
22 given that it's a newly passed ordinance with
23 penalties of jail. It's not unreasonable for
24 them to refrain from distributing literature if
25 they enter into the street.

1 THE COURT: And it's only
2 distribution that they're engaging in. It's not
3 solicitation; correct?

4 MR. ROTHERT: So in our view it's
5 just distribution, yes.

6 THE COURT: Okay.

7 MR. ROTHERT: And, you know, the
8 city officials -- solicitation is not defined in
9 the new ordinance. It describes certain types of
10 solicitation that are prohibited, but it doesn't
11 define solicitation. The City has previously --
12 Mr. Ancona testified and we have a letter where
13 they say in that they include -- they thought
14 that distributing literature might be
15 solicitation. So that's the concern there.

16 And even if specifically what
17 Mr. Ancona does and other members do could be
18 considered -- might not be considered
19 solicitation, I think they still have standing on
20 behalf of third parties not before the Court to
21 bring an overbreadth claim that the Supreme Court
22 has made an exception for First Amendment cases
23 where there's a claim of overbreadth, most
24 recently in the United States v. Stevens, which
25 had to do with crush videos. Yeah.

1 Even though Mr. Stevens probably
2 wasn't protected he was able to bring a claim on
3 behalf of people whose speech was protected such
4 as hunters who wanted to videotape their hunting.

5 For the First Amendment purposes,
6 you know, the burden, of course, is on the
7 government official. I'll just very briefly say
8 we don't think the solicitation portion is
9 content neutral because it does not apply to all
10 solicitation.

11 The National Federation of the Blind
12 v. Arkansas is distinguishable. That's cited in
13 the sur-reply. The statute issue there allowed a
14 person receiving the phone call in their home to
15 say they didn't want to hear -- they didn't want
16 to hear anything more from a caller, and it
17 didn't matter what the solicitation was about it
18 applied. The difference here is that the law
19 does make a distinction, and the intent is to
20 have certain types of solicitation be prohibited
21 and certain types not be.

22 Second, the Court in the National
23 Federation of the Blind of Arkansas distinguished
24 the situation before it, which was the intrusion
25 into the privacy of the home from expressive

1 activity in a public forum. It said this is
2 different. And this is the street, which is a
3 public forum.

4 As to -- I think the real crux here
5 is whether or not at this stage is whether or not
6 this ordinance is narrowly tailored. And I'd
7 like to make six points about that.

8 The first is the distinction between
9 distribution and solicitation. Aside from the
10 Ohio case and Ater all cases on the topic of
11 distributing or soliciting were limited to
12 solicitation as opposed to distribution of
13 literature on the roadway.

14 In the earlier case Judge Fleissig
15 made that distinction in distinguishing the Baton
16 Rouge case precisely because it was limited to
17 solicitation. I think that makes this case
18 different. The Supreme Court has said there's a
19 difference in the level of distraction or
20 disruption caused by distribution of literature
21 versus solicitation and just handing a leaflet to
22 someone is different than engaging them in a
23 business conversation.

24 The second reason we believe that
25 we're likely to show the ordinance is not

1 narrowly tailored is that it applies at all times
2 at all streets and all intersections.

3 The conclusion that they just
4 shouldn't do it anywhere or shouldn't have
5 pedestrians anywhere on the street is
6 inconsistent with Desologe's own rules for
7 governing other -- other activity other than
8 expressive activity. So, for example, you know,
9 there are bus stops and taxi stands where an
10 individual stands by the road, a vehicle stops
11 and that individual enters the road.

12 THE COURT: They have a taxi stand
13 in Desologe?

14 MR. ROTHERT: well, they have an
15 ordinance. They have an ordinance that
16 requires --

17 THE COURT: I just -- I'm sorry. I
18 just wondered --

19 MR. ROTHERT: They have an ordinance
20 that requires them to have one. I don't -- you
21 know, they also ban distributing on medians and
22 have no medians.

23 THE COURT: Right. And they didn't
24 have a median either. Okay.

25 MR. ROTHERT: But the ordinance says

1 that. You know, there do have to be bus stops,
2 and bus stops are similar to, you know,
3 individual stands by the road a vehicle stops and
4 an individual enters the roadway.

5 Also, streets are sometimes
6 sidewalks by rule -- by ordinance where there is
7 no sidewalk, and that's inconsistent with the
8 blanket rule that it's never safe for anyone ever
9 to enter a street.

10 And the conclusion that there should
11 be a blanket rule that it's never safe anywhere
12 is not the product of -- the type of analysis
13 that traffic engineers and government officials
14 do on a daily basis. One of our affidavits says
15 that, but it's also common sense that officials
16 have to make -- look at specific incidents and
17 make decisions. That's why there are stop signs
18 at some intersections, stop lights at others and
19 neither at others. Intersections are different,
20 and the ordinance treats them all the same.

21 The third reason while it's not
22 narrowly tailored is because it includes all
23 parts of the road, including parking lanes. The
24 pictures show there are parts of the road that
25 are designated for parking, but the ordinance

1 prohibits distributing literature from those.

2 The Defendant's expert said no when
3 asked if it's possible to distribute literature
4 from a sidewalk to a parked vehicle. So the fact
5 that that's allowed, you know, isn't much help.
6 That distinguishes this case from ACORN v.
7 St. Louis County where the ordinance did not
8 forbid solicitors -- those were solicitors -- did
9 not forbid them from seeking and collecting funds
10 from occupants of vehicles if they remained on
11 the median or along the shoulder.

12 So related to this I guess the
13 fourth --

14 THE COURT: I do have a question
15 since you mentioned ACORN, which found that in
16 the roadway solicitation was dangerous, and I
17 know that the courts have made this distinction
18 between distribution and solicitation, but why
19 doesn't distribution pose the same risk as
20 solicitation?

21 MR. ROTHERT: The reason -- and I
22 don't want to suggest there's no government
23 interest in support of it. We haven't contested
24 that there's no government interest and you could
25 put some regulation on it. But solicitation --

1 the main reason solicitation is different is
2 because it takes longer, and it involves back and
3 forth. And I think even their expert testified
4 to that, there's a back and forth and back again.

5 Distribution of literature is a --
6 it's a one-way transaction, and if it's refused,
7 it's over. So it takes a shorter amount of time.
8 That's why courts have frequently made the
9 distinction in other contexts including at
10 airports, and, you know, parks and elsewhere.

11 THE COURT: Uh-huh.

12 MR. ROTHERT: Also, the ordinance is
13 not narrowly tailored because it's under
14 inclusive. That's something the Eighth Circuit
15 pointed out today. The ordinance allows lots of
16 equally disruptive or distracting or dangerous
17 behavior, so it allows you to stand with a sign
18 in a roadway. It allows you to enter a roadway
19 to put distribution -- to distribute a leaflet by
20 putting it on a car that's in the parking area.
21 It allows people in vehicles to distribute
22 literature to people to come off the sidewalk and
23 distribute literature to the person.

24 These are all examples of how the
25 ordinance is under inclusive to its stated goal

1 and that that's a relevant factor in considering
2 whether something is narrowly tailored. And it's
3 also narrowly tailored in -- not narrowly
4 tailored in that the ordinance places the burden
5 on the distributor to prevent the driver from
6 being distracted, and, you know, this is
7 misplacing the burden.

8 In Krantz v. City of Fort Smith, I
9 believe, the Eighth Circuit -- this had to do
10 with putting leaflets on parked cars. The Eighth
11 Circuit noted that when someone hands a leaflet
12 to an individual and that individual litters, we
13 punish the litterbug and not the leaflet holder.
14 And Mr. Camp testified that that's the same in
15 Desologe.

16 If someone is distracted while
17 driving, we should punish the person who's not
18 keeping control or not focusing on the road, not
19 the picketer or the billboard or the distributor
20 of literature that might have distracted them.

21 Here -- I mean, drivers have an
22 obligation to not be distracted while driving,
23 and it's their responsibility not to hit people
24 who are, you know, parking in the parking lane or
25 walking on the road where there's no sidewalk or

1 distributing literature or crossing the road or
2 being a crossing guard. It's the driver's
3 burden.

4 And finally, closely related to that
5 is there are -- the law is not narrowly tailored,
6 because there are other laws in Desologe. It's
7 relevant to consider the other ways that the
8 government could meet its interest. And there
9 are numerous obvious ones here, including maybe
10 limiting distribution at problem intersections or
11 at problem times or requiring people be 18 to
12 distribute literature or requiring them to wear
13 bright vests. There are many narrower ways other
14 than completely banning it throughout the City.

15 I want to mention Heffron v.
16 International Society For Krishna Consciousness.
17 That's a case relied on heavily by the Defendant.
18 And it was somehow distinguished -- I don't know
19 how -- in today's case from the Eighth Circuit.

20 I think it's distinguishable from
21 what we have here, though, because Heffron
22 involved a limited public forum, not a
23 traditional public forum. And the Supreme Court
24 specifically distinguished streets from
25 fairgrounds.

1 And I just wanted to repeat a little
2 of what they said. "Consideration of a forum's
3 special attributes is relevant to the
4 constitutionality of a regulation since the
5 significance of the governmental interest must be
6 assessed in light of the characteristic nature
7 and function of the particular forum involved.
8 This observation bears particular import in the
9 present case since respondents make a number of
10 analogies between the fairgrounds and city
11 streets, which have 'immemorially been held in
12 trust for the use of the public and have been
13 used for the purposes of assembly, communicating
14 thoughts between citizens and discussing public
15 questions.'"

16 "But it is clear that there are
17 significant differences between a street and the
18 fairgrounds. A street is continually open, often
19 uncongested and constitutes not only a necessary
20 conduit in the daily affairs of a locality's
21 citizens, but also a place where people may enjoy
22 the open air or the company of friends and
23 neighbors in a relaxed environment."

24 You know, the Minnesota State Fair
25 is different the Eighth Circuit said -- or the

1 Supreme Court said, and any comparison to a
2 public street is necessarily an exact. You know,
3 here we are talking public streets, so it's
4 different than the fair.

5 And finally, I just wanted to
6 note -- well, no, I don't. The evidence -- the
7 photographs that were entered into evidence too I
8 think -- I don't think we need to suspend
9 comments -- the Court doesn't need to completely
10 especially at this early stage suspend its
11 reliance on its own experience.

12 The photos that are attached to the
13 consultant's report from Defendants and the ones
14 we've admitted into evidence, you know,
15 demonstrate that this is not a high traffic area
16 or at least not all streets in Desologe are high
17 traffic. It's, in fact, very light. And,
18 therefore, the government interest is less.

19 I think that, you know, the
20 consultant for the Defendants made a point that
21 there are lots of reasons why by tradition we
22 allow people onto streets even though it might
23 not be safe. And what he has overlooked is that
24 as the US Supreme Court said in 1938 in the
25 Jamison case that one of the traditional purposes

1 of streets is to allow communication of ideas,
2 including for the distribution of literature and
3 handbills. And also this should be an exception
4 to the rule, and if it's not, any restriction
5 should be narrowly tailored.

6 I'm not going to -- I think we
7 agree, perhaps, that whether a preliminary
8 injunction should issue turns on the likelihood
9 of success on the merits. If we do disagree,
10 I'll come talk about those later, but for those
11 reasons we'd ask for entry of a preliminary
12 injunction. Thank you.

13 THE COURT: All right. Thank you.
14 Mr. Young.

15 (Defendant's Argument.)

16 MR. YOUNG: Thank you, Your Honor.
17 I'll start off first by noting that the 1938
18 Jamison case presented streets that were
19 completely different than modern day streets with
20 completely different volumes of vehicles, types
21 of vehicles.

22 And so the context of that Supreme
23 Court case against the modern day concerns are
24 reflected in cases like ACORN v. St. Louis County
25 and Baton Rouge and the ACORN v. Baton Rouge.

1 There's a recognition that the governmental
2 interests of public safety and the injury to the
3 person is a much greater and higher problem today
4 than it would have been in 1938 when those
5 statements were made about streets.

6 Let me -- that was just my first
7 observation. And my second observation is I've
8 got to tell the Court I don't know anything about
9 the case that was handed down today.

10 THE COURT: Nor do I, so we'll be
11 learning about it at the same time.

12 MR. YOUNG: Well, what I wondered
13 was if it made sense, because I have no way of
14 even trying to respond to the comments that were
15 made.

16 THE COURT: Right.

17 MR. YOUNG: If it made sense just on
18 that case that we have a very short briefing
19 schedule for each side to try and tell the Court
20 why we think it is or isn't relevant on any of
21 these points.

22 THE COURT: Do you have any concern
23 about that? If -- obviously, if there was a
24 briefing schedule allowed, we would still need to
25 hold -- the ordinance would need to be held in

1 abeyance while we did that. I mean, that would
2 be my concern about that.

3 MR. YOUNG: well, I guess I
4 understand that.

5 MR. ROTHERT: It could be very
6 short. It's just analyzing one case.

7 THE COURT: Right.

8 MR. YOUNG: Do you have any idea how
9 long the opinion is even?

10 MR. ROTHERT: It's not very long.

11 MR. YOUNG: Even better.

12 MR. ROTHERT: It's about two pages.
13 It's not very long.

14 MR. YOUNG: If I might have a
15 minute. Your Honor, we don't have a problem
16 agreeing to a continued abeyance until we can
17 complete a reasonable briefing schedule so the
18 Court can get the benefit of our thoughts.

19 THE COURT: That would be --

20 MR. YOUNG: However relevant they
21 may be.

22 THE COURT: Okay.

23 MR. YOUNG: So we'll just --

24 MR. ROTHERT: Just one
25 clarification. Could we hold it until we -- I

1 mean, not until we are done briefing, but until
2 --

3 THE COURT: How about until I rule?
4 That would be really good. And --

5 MR. YOUNG: And that's what we
6 really set up first, and that's what I meant.
7 Yes, Your Honor. That's fine.

8 THE COURT: All right.

9 MR. YOUNG: Let me kind of get to
10 the heart of the legal argument. Obviously,
11 there's the four Dataphase factors. Likelihood
12 of success is the real key here on these. I'll
13 just note that I think the other factors if the
14 Court considers that the sole and significant
15 governmental interest here is public safety of
16 pedestrians and drivers and occupants in motor
17 vehicles, that's a pretty important governmental
18 interest to be involved in the balancing.

19 But let's talk about the likelihood
20 of success. The real crux of the KKK's position
21 here is that they contend they should be able to
22 stand in any roadway within Desologe to
23 distribute leaflets to vehicles that are being
24 operated in the roadway. That's -- as the Court
25 has seen -- and it may be slowly, but we've

1 gotten to the point where we have an ordinance
2 here that is directly aimed at not allowing
3 distribution or solicitation within the roadway.
4 That's the problem.

5 The Court has heard the public
6 safety information from the expert witness, and
7 that is the real crux of the issue.

8 THE COURT: Let me ask you a
9 question about that.

10 MR. YOUNG: Sure.

11 THE COURT: Because obviously the
12 distribution versus solicitation is a major --
13 that's -- the good distinction we're looking at.
14 There are cases on the solicitation ground, but
15 in looking at distribution can you tell me what
16 is your strongest argument for banning
17 distribution from a roadway for safety reasons,
18 because, you know, I'm looking at the case, and I
19 see solicitation, but I'm just --

20 MR. YOUNG: The Ater case out of the
21 Sixth Circuit is the --

22 THE COURT: That's what I thought
23 you would say.

24 MR. YOUNG: Yeah, that's the
25 distribution case, Your Honor.

1 THE COURT: Okay.

2 MR. YOUNG: There's a state statute
3 that doesn't allow distribution in the state
4 highways that was at issue there. And I think
5 it's squarely on point. The court there
6 concluded it was narrowly tailored.

7 So we have one -- you know, we have
8 each -- an example of each situation. We have
9 Ater, and then we have a whole series starting --
10 for our purposes the most relevant being ACORN --

11 THE COURT: ACORN, right.

12 MR. YOUNG: -- v. St. Louis County,
13 the Eighth Circuit case, that covers the
14 solicitation. And so I think we've got both
15 covered with cases that are directly on point.

16 Your -- the Court's obviously -- I
17 mean, it's literally on point. ACORN v. St.
18 Louis County includes language on solicitation
19 that's virtually identical to what was passed
20 here. And I think subject to whatever today's
21 case may have said, but it wasn't a solicitation
22 in the roadway case, so I don't think it
23 overrules ACORN v. St. Louis County in any way.
24 I think the Court is really bound by ACORN v. St.
25 Louis County on that.

1 THE COURT: On the issue of
2 solicitation?

3 MR. YOUNG: On the issue of
4 solicitation, correct.

5 THE COURT: Right.

6 MR. YOUNG: I'm not trying to extend
7 that --

8 THE COURT: If they're able to
9 challenge the solicitation part of it.

10 MR. YOUNG: I'll get to that in a
11 moment.

12 THE COURT: Sorry. I'm confusing
13 you here.

14 MR. YOUNG: No, no, no. That's
15 okay. But that's part of the other argument.

16 THE COURT: Okay.

17 MR. YOUNG: But what I want to do is
18 get to --

19 THE COURT: I want to talk about
20 narrowly tailored. Can we go there?

21 MR. YOUNG: Okay. Because that's
22 where I was going to go.

23 THE COURT: Okay. That would be
24 great.

25 MR. YOUNG: Do you want me to talk,

1 or do you want to ask questions?

2 THE COURT: You can go ahead and
3 talk about it.

4 MR. YOUNG: All right, Your Honor.

5 THE COURT: And I might interrupt
6 you.

7 MR. YOUNG: That's fine.

8 THE COURT: Okay.

9 MR. YOUNG: Before I get to narrowly
10 tailored I just want to make one comment.

11 THE COURT: Okay.

12 MR. YOUNG: In Heffron, the
13 Minnesota State Fair U.S. Supreme Court case,
14 that covered both solicitation and distribution
15 within pedestrian crowds at the Minneapolis State
16 Fair. And the court there concluded that there
17 was a valid governmental objective just
18 controlling the safety and the traffic flow, so
19 to speak, of pedestrians on foot. There were no
20 motor vehicles involved.

21 If that is a sufficient governmental
22 objective, clearly it's a situation that can
23 involve life and death for pedestrians, for
24 drivers or occupants depending on what happens in
25 the roadway is even a higher level safety risk

1 that rises to a higher governmental objective.
2 And so I just point that out as we go into the
3 narrow tailoring aspect.

4 THE COURT: Can I ask you to pause
5 just a second?

6 (A discussion was held off the
7 record.)

8 THE COURT: We have manpower issues,
9 so I'm going to let them go. I don't think it
10 will be necessary, because all we have is lawyers
11 left, right, for who are here? Okay. We're
12 good.

13 MR. YOUNG: Right. And the city
14 administrator.

15 THE COURT: I think I can trust
16 you-all. Okay.

17 MR. YOUNG: Thank you, Your Honor.
18 I appreciate that.

19 THE COURT: All right. Earlier we
20 just had so many people. That's why I had the
21 CSO here.

22 MR. YOUNG: Understood.

23 THE COURT: So I'm sorry to
24 interrupt.

25 MR. YOUNG: Oh, no. Not a problem.

1 THE COURT: But I just wanted to
2 give them the opportunity --

3 MR. YOUNG: The only additional
4 point I'll make on a significant governmental
5 interest in public safety and roadways is that
6 that's confirmed by ACORN v. St. Louis County and
7 Ater v. Armstrong, The City of Baton Rouge, ACORN
8 v. The City of Phoenix, which we contend was not
9 overruled by Redondo Beach, but we'll get to
10 that.

11 okay. Narrowly tailored. The
12 amended ordinance here prohibits pedestrians from
13 soliciting or distributing within the roadway,
14 and that roadway is defined strictly as the
15 surface that the motor vehicles travel on. It
16 does not cover curbs, sidewalks, areas outside
17 the roadways or areas where a parked vehicle is
18 sitting when you can hand it from the adjacent
19 sidewalk.

20 Consistent with the identified
21 governmental interest of public safety the
22 amended ordinance only precludes certain
23 expressive conduct within the areas in its town
24 where motor vehicles operate on the roadway.

25 The Court should recognize from the

1 ACORN v. St. Louis County case that the
2 regulation -- albeit it's narrowly tailoring, but
3 for purposes of narrowed tailoring ACORN v. St.
4 Louis County says the regulation doesn't have to
5 be the least restrictive or the least intrusive
6 means of serving public safety interests.
7 Instead the narrowly tailored requirement is
8 satisfied under the ACORN v. St. Louis County
9 case so long as it promotes a substantial
10 governmental interest that would be achieved less
11 effectively absent the regulation. That's
12 basically an exact quote from ACORN v. St. Louis
13 County.

14 We go on to state the validity of
15 time, place or manner regulations do not turn on
16 the Judge's agreement with the responsible
17 decision maker concerning the significant -- I'm
18 sorry, concerning the most appropriate method for
19 promoting significant governmental interest or
20 the greed at which those interests should be
21 promoted.

22 And that's Ater v. Armstrong states
23 that and picks that quote straight out of the
24 U.S. Supreme Court case of Ward v. Rock Against
25 Racism. So what we're saying here is that the

1 narrow tailoring doesn't require the City to find
2 the most -- or the least restrictive and least
3 intrusive, most beneficial interpretation of an
4 ordinance for the party attacking it.

5 what it says is that so long as the
6 Court concludes that there is a substantial
7 governmental interest, which I don't think
8 there's any question here there's a substantial
9 governmental interest in public safety in the
10 roadway, ACORN v. St. Louis County and following
11 this concept in Ater v. Armstrong basically the
12 Court is not supposed to substitute its view, or
13 it doesn't have to agree with the responsible
14 decision makers concerning the most appropriate
15 method for promoting that significant
16 governmental interest, because once the
17 municipality demonstrates a real need for the
18 Government to act to protect the public
19 interest -- and this is a quote straight from
20 ACORN v. St. Louis County -- the Government's
21 choice among the means to accomplish its end is
22 entitled to deference from the court.

23 so what I'm saying is in this
24 instance, because we've got a very significant
25 public interest in the form of the concern for

1 public safety that's the only concern that this
2 Court has, and the evidence is clear on that.
3 We're not worried about traffic congestion or
4 this or that. We're trying to save people's
5 lives in the street.

6 That is significant enough once the
7 Court determines that is a valid governmental
8 significant interest, then the Court basically
9 doesn't get to rewrite the ordinance or restrict
10 it and pick and choose, almost blue line the
11 ordinance the way that the Plaintiffs have
12 suggested with -- and that that's not a fault in
13 the ordinance. The Court must defer to the way
14 the government has chosen to regulate the
15 ordinance. And so I think that's where we end up
16 on narrow tailoring, and that's straight out of
17 ACORN v. St. Louis County.

18 The amended ordinance is entitled to
19 that deference because there is that governmental
20 interest. If there's any doubt about the
21 Government's regulation for public safety, this
22 Court need only look to the precedent of the U.S.
23 Supreme Court in Heffron, which said it was
24 important enough with a bunch of pedestrians in a
25 state fair location to meet the level of a

1 significant governmental interest, certainly a
2 location of individuals within the roadway must
3 meet that.

4 So this Court looking to the
5 precedent within the Eighth Circuit of ACORN v.
6 St. Louis County should recognize that an
7 ordinance prohibiting solicitation within the
8 streets under a virtually identical ordinance
9 that -- that ordinance basically said you can't
10 solicit for rides -- literally it's right down
11 the line on that.

12 So we think that the Court is bound
13 by ACORN v. St. Louis County on narrow tailoring,
14 and it's supported by cases like Baton Rouge, the
15 ACORN v. St. Louis -- ACORN v. City of Baton
16 Rouge -- it's a 5th Circuit Case -- U.S. Labor
17 Party v. Oremus, a 7th Circuit case, ACORN v.
18 City of Phoenix, 9th Circuit case, that all
19 uphold the regulation of solicitation. Now,
20 admittedly those are all just solicitation cases,
21 as we talked about earlier.

22 But they're all basically based on
23 very, very similar language on solicitation. And
24 it's not a total anti-solicitation situation that
25 the Courts have approved there.

1 And then the Court can also look to
2 the decision and reasoning upholding the ban on
3 distribution, as I said, under Ater v. Armstrong.
4 So we suggest you have -- even though ACORN v.
5 St. Louis County only applies to solicitation the
6 logic applies where there's a significant
7 governmental interest to the Court giving
8 deference when there's a narrow tailoring in the
9 distribution setting. And the 6th Circuit there
10 concluded that the state ordinance that -- or the
11 state statute prohibited distribution in the
12 roadways was constitutional against an attack
13 basically along the same lines as we're talking
14 about here.

15 In response to this plethora of
16 decisions supporting the constitutionality of the
17 amended ordinance, the KKK points to the Redondo
18 Beach case, the 9th Circuit case. And then they
19 plug in an incorrect statement that Redondo Beach
20 reversed the City of Phoenix case. Well, Redondo
21 Beach very clearly only reversed the City of
22 Phoenix decision to the extent it was
23 inconsistent with the Redondo Beach decision.

24 And that inconsistency if you look
25 at the cases only occurred regarding issues

1 surrounding prohibitions on the sidewalks, not
2 what was going on in the street. What happened
3 is Redondo Beach concluded that there was an
4 overbreadth that went to sidewalks and other
5 issues relating to vandalism and nuisance and
6 other governmental purposes that were trying to
7 be served.

8 And we suggest to you that the only
9 part of the City of Phoenix which was overruled
10 was where that ordinance in the City of Phoenix
11 case extended to sidewalks beyond streets. And
12 we're not -- we very clearly delineated sidewalks
13 here. They're perfectly free to do whatever they
14 want on sidewalks. It's only within the roadway
15 where that safety issue exists that we're trying
16 to regulate.

17 So we suggest the City of Phoenix
18 case still stands as a valid decision on the
19 constitutionality of the prohibition concerning
20 pedestrians in the street and regulating them.

21 So once we've shown this narrow
22 tailoring through this whole series of cases,
23 then the next question is what are the ample
24 alternative means that are available to them, or
25 are there ample alternative means? And the

1 evidence clearly shows that KKK can solicit or
2 distribute -- particularly their concerns of
3 distribution -- from sidewalks, from grassy areas
4 right beside the street to parked cars, from the
5 city park, in the city park, from trails and the
6 city parking lot.

7 There's a myriad of possibilities
8 where they're not posing the substantial personal
9 injury risks that are associated with individuals
10 darting out into traffic trying to talk to
11 somebody stopped at a stop sign or a traffic
12 light engaging them in the way we oftentimes see
13 that happen.

14 THE COURT: Now, they can -- if I
15 recall, they can step into the roadway to place a
16 leaflet onto a car -- a parked car; is that
17 right?

18 MR. YOUNG: I think that's right,
19 Your Honor.

20 THE COURT: Okay. But it becomes
21 unlawful if they step into the same roadway to
22 hand a leaflet to some -- to an occupant of a
23 car?

24 MR. YOUNG: well, let me say this:
25 I think the ordinance would say you can put the

1 leaflet on the windshield from the roadway right
2 beside the --

3 THE COURT: It's just says the
4 road -- I mean --

5 MR. YOUNG: -- adjacent to the
6 sidewalk. That's right. And you can't go out
7 into the road -- around to the other side, I
8 guess, to that person. You're supposed to do it
9 from the sidewalk is what I'm trying to say.
10 You're not supposed to get out into the traffic
11 area.

12 THE COURT: And so let's say, for
13 example, someone lives in a neighborhood on a
14 street that's not traveled very much, and someone
15 sees her neighbor out there, and her neighbor is
16 pulling out of her driveway into the street, and
17 she wants to go over and hand her some literature
18 about breast cancer awareness. At that point she
19 is violating the ordinance; correct?

20 MR. YOUNG: I don't think there's
21 any question that's a technical violation, Your
22 Honor. The problem is that there's a public
23 safety issue there no matter what. I mean, kids
24 handing something to each other in the street,
25 toys or something, passing them along. That's a

1 public safety issue.

2 THE COURT: Actually, if two kids
3 are in the street with their bicycles -- one is
4 on a bicycle and one is on the street and hands
5 him something, that doesn't violate this
6 ordinance, does it?

7 MR. YOUNG: I'm trying to --

8 THE COURT: I know. That's the --

9 MR. YOUNG: I mean --

10 THE COURT: Maybe there's another
11 ordinance that says you can't do that, but it
12 doesn't violate this ordinance the way this
13 ordinance is written. If a kid is on a bicycle
14 in the street -- and bicycles can be in the
15 street or an adult on a bicycle in the street,
16 and a kid walks up and hands a leaflet to the
17 person on the bicycle from the roadway, that does
18 not violate this ordinance.

19 MR. YOUNG: Let me look at the
20 ordinance real quick, but before I get to that
21 what strikes me about this what if game --

22 THE COURT: I know.

23 MR. YOUNG: I mean, there were a lot
24 of what ifs posed to the witness.

25 THE COURT: Right.

1 MR. YOUNG: And Mr. Rothert has
2 presented them in his argument. That's exactly
3 the reason why ACORN v. St. Louis County says the
4 Court -- if it's narrowly tailored to meet the
5 significant governmental interest, the Court
6 gives deference, because the Court isn't in the
7 job of trying to second guess the City on all
8 those instances. And that is true -- these what
9 ifs are almost true in every criminal -- you
10 know, every criminal law we have in the country.
11 It's part of the nature of legislating, because
12 somebody can always come up with an example of
13 something that well, what if, is it in or out.
14 Now, let me get back to your question that you
15 really posed.

16 THE COURT: Okay.

17 MR. YOUNG: The bicycle is not a
18 vehicle.

19 THE COURT: Right. Yeah.

20 MR. YOUNG: So I think that's not a
21 motor vehicle. So I think you're right. Your
22 conclusion is correct.

23 THE COURT: All right. Okay.

24 MR. YOUNG: All right. So the last
25 thing I really want to address is the amended

1 ordinance is content neutral. That raises the
2 lack of standing issue that the Court has asked
3 about.

4 And I think that the standing issue
5 is pretty clear. I mean, the evidence is clear
6 that the KKK has not pled, nor does it claim that
7 it's really involved in any solicitation as
8 defined in this ordinance that's at issue today.

9 The ordinance calls for
10 severability, which is important in the case law.
11 The adopting ordinance over the whole code calls
12 for severability. When we look at the
13 controlling cases, which would be Lujan and the
14 Republican Party of Minnesota case, what we
15 basically say is the Plaintiff has an obligation
16 to show injury, causation and redressability with
17 respect to each provision and challenges as
18 overbroad to meet the Article III standing
19 requirements, and that's Advantage Media that
20 says that looking through the Lujan language.

21 So the Court goes on -- or actually,
22 a different court goes on to say that -- no, I'm
23 sorry, it is Advantage Media -- to establish
24 causation a Plaintiff must show that the injury
25 is fairly traceable to a challenged statutory

1 provision. They've got no injury that relates
2 back to solicitation, which is the only provision
3 they're challenging as content based.

4 And so they don't have standing.
5 They can't meet the standing test that the
6 Supreme Court has established with respect to
7 solicitation -- or the solicitation portion of
8 the ordinance, I should say. They have never
9 done solicitation that's at issue here. And
10 there's no evidence before the Court that they
11 will do it.

12 So we think they lack standing for
13 that reason; and, therefore, the Court doesn't
14 even have to go into the whole content neutral
15 versus content based analysis, but if we get into
16 it, we still contend that the amended ordinance
17 is content neutral.

18 What they've brought up late is the
19 Whitton 8th Circuit case -- Whitton v. The City
20 of Gladstone -- and the Neighborhood Enterprises
21 v. The City of St. Louis cases, but both those
22 cases are sign cases. They don't have anything
23 to do with roadways or what could be done in the
24 roadway, and they don't have anything to do with
25 solicitation or distribution either.

1 what we suggest to the Court is that
2 they don't stand for this -- I mean, if you would
3 take the argument made to its logical extent, by
4 implication somehow these cases may reverse ACORN
5 v. St. Louis County, which is ludicrous, they
6 don't even come close to the content.

7 what we suggest to the Court that is
8 more important is that you've got ACORN v.
9 St. Louis County. You've got this whole series
10 of cases that we talked about that look at the
11 entire subject of the -- or the subject language
12 of the ordinance, the content of the ordinance,
13 and they say -- in every one there's never a
14 content -- a suggestion that they're not content
15 neutral even though they're virtually identical
16 language on the solicitation.

17 And then when you -- the Court
18 considers the case we cited in our sur-reply,
19 which is the 8th Circuit case that came in after
20 the Whitton case and before the Neighborhood
21 Enterprises case that's the National Federation
22 of the Blind of Arkansas v. Pryor we suggest that
23 that case upheld an Arkansas statute that placed
24 restrictions specifically and exclusively on
25 anyone placing a telephone call to an Arkansas

1 resident to solicit a charitable contribution or
2 to offer any commercial product or service. And
3 the court there concluded it was content neutral.

4 So we suggest to the Court that even
5 if the Court wants to look at this content based
6 versus content neutral issue, the closest case
7 for purposes of this solicitation language that
8 they're challenging is this telephone call
9 statute that covers charitable contribution,
10 covers commercial products and services, and it
11 concludes it covers only those things. It didn't
12 cover or prohibit phone calls, say, related to
13 political campaigns, which is the big example
14 that they give. And the court there didn't find
15 any problem with content neutrality, that statute
16 passed muster. So for those reasons we think
17 that this is a content neutral ordinance.

18 And the only final thing I'll say on
19 this point of the content based versus content
20 neutral question is ultimately the main inquiry
21 into deciding content neutrality, especially in
22 time, place or manner cases, should be whether
23 the government has adopted a regulation of speech
24 because of the disagreement with the message it
25 conveys. If that's what the government has done,

1 that's content neutrality.

2 The government's purpose is the
3 controlling consideration. A regulation that
4 serves purposes unrelated to the content of the
5 expression is deemed neutral even if it as an
6 incidental effect -- even if it has an incidental
7 effect on some speakers or messages but not on
8 others.

9 The government regulation of
10 expressive activity is content neutral so long as
11 it is justified without reference to the content
12 of the speech. And we suggest here that this
13 ordinance doesn't make any reference to the
14 content of the speech as to solicitation.

15 And, in any event, they don't have
16 standing.

17 Thank you, Your Honor.

18 THE COURT: Thank you, Mr. Young.

19 Do you have a little more?

20 MR. ROTHERT: Sure.

21 THE COURT: Okay.

22 MR. ROTHERT: I didn't mention
23 Redondo Beach. I hoped we were going to skip it,
24 but I'd like to -- but I will.

25 First of all, just to clarify, what

1 we're arguing is what's protected
2 constitutionally is not standing in the middle of
3 the roadway distributing literature it's stepping
4 into the street to distribute a leaflet to the
5 occupant of a stopped vehicle, you know, that's
6 not moving.

7 And as far as deference to be paid
8 in the narrowly tailored analysis, you know, in
9 the First Amendment context we do -- we have to
10 play the what if game. Overbreadth -- the
11 overbreadth doctrine that requires us to describe
12 areas in which protected speech would be made
13 unconstitutional by the ordinance.

14 Redondo Beach, for example, and
15 United States v. Stevens provided a long list of
16 hypotheticals about Girl Scouts going into a
17 residential street to sell cookies. And so that
18 is appropriate here.

19 The government doesn't just get
20 deference. They have to provide evidence showing
21 that the law is narrowly tailored. I think the
22 8th Circuit said that in Phelps-Roper v. Koster
23 earlier this year. The 7th Circuit has said it
24 in Heffron v. City of Granite City, Illinois,
25 which involved leaflets on parked cars. There

1 has to be some kind of nexus between the
2 restriction and the governmental interest, some
3 kind of causation.

4 I won't -- obviously, we disagree a
5 little bit on whether the City of Phoenix was
6 overruled or to what extent it was overruled. I
7 think it's at footnote 5 of Redondo Beach which
8 explains that it's overruling and limiting it to
9 solicitation. The Phoenix decision is about
10 solicitation and Redondo Beach is about
11 distribution and solicitation. Redondo Beach did
12 apply on sidewalks and streets, but
13 the overbreadth analysis was applicable as it
14 applied on streets and on sidewalks.

15 THE COURT: With regard to the issue
16 of solicitation --

17 MR. ROTHERT: Yes.

18 THE COURT: -- do you really feel
19 that you have standing to challenge the
20 solicitation aspect of this ordinance? Really
21 truly?

22 MR. ROTHERT: When I -- if I read
23 the ordinance, Mr. Ancona does not intend to
24 solicit.

25 THE COURT: Right.

1 MR. ROTHERT: But he does intend to
2 distribute leaflets. The City of Desologe
3 officials have told him that's solicitation.

4 THE COURT: Right.

5 MR. ROTHERT: That's why.

6 THE COURT: Okay.

7 MR. ROTHERT: And they didn't define
8 it.

9 THE COURT: Okay.

10 MR. ROTHERT: So that's the reason
11 we think we have standing. If the Court were to
12 say there's no way the solicitation applies to
13 distributing literature, then there would be no
14 standing.

15 THE COURT: Okay. All right.

16 MR. ROTHERT: And I just want to say
17 solicitation could be banned in a content neutral
18 way the same way that distribution was. It could
19 just ban all solicitation --

20 THE COURT: Right.

21 MR. ROTHERT: -- instead of saying
22 certain parts. And the fact that the City has
23 chosen not to do that shows that the ordinance is
24 another way in which it's under inclusive because
25 it still allows a lot of activity.

1 All right. I have nothing further.

2 THE COURT: Okay. All right. Thank
3 you.

4 One more thing and that's it.

5 MR. YOUNG: Just one more point,
6 because I think there's confusion on -- just so
7 we're clear, the City of Desologe didn't -- when
8 it said solicitation is distribution or
9 distribution constituted solicitation, it was
10 under the prior ordinance --

11 THE COURT: I know.

12 MR. YOUNG: -- language, totally
13 different, not distinguished the way it is in the
14 current ordinance.

15 THE COURT: I do understand. Yes.
16 I think we made that clear in the process.

17 Thank you, all. This has been quite
18 interesting today.

19 And with regard to timing today is
20 the 11th, and I don't -- do you think two
21 weeks -- do you think you need that long? well,
22 I mean, if you -- I don't know that you need to
23 do -- I mean, I think you can both file -- do it
24 simultaneously.

25 MR. YOUNG: I was going to suggest

1 the same thing to expedite it.

2 THE COURT: I don't think that's
3 necessary. So, yeah, that's fine.

4 So by like next Friday?

5 MR. YOUNG: I was just going to say
6 what about a week from Friday, which is the --

7 THE COURT: A week from Friday. The
8 20th.

9 MR. YOUNG: The 20th?

10 THE COURT: It's the 20th.

11 MR. YOUNG: Okay. The 20th.

12 THE COURT: Okay. All right. That
13 will be great.

14 MR. ROTHERT: Can we agree on a time
15 that you want us to file by, so we don't stay up
16 until 11:59?

17 THE COURT: Can we pick a time?

18 MR. YOUNG: My secretary leaves at
19 4:30.

20 MR. ROTHERT: So how about like by
21 4:30?

22 THE COURT: 4:30 on Friday the 20th.

23 MR. YOUNG: And we don't want to
24 have who can read the fastest and respond.

25 THE COURT: Okay. 4:30 by Friday

1 the 20th.

2 And, just for the record, the
3 ordinance will be held in abeyance until the
4 Court issues a ruling regarding the --

5 MR. YOUNG: For the record, that's
6 understood.

7 THE COURT: Yes.

8 MR. YOUNG: And the city
9 administrator has acknowledged that for the City
10 of Desologe.

11 THE COURT: Yes. Okay.

12 Is there anything else we need to
13 talk about while we have everyone here?

14 MR. ROTHERT: I don't think so.

15 THE COURT: Okay. Great. Thank you
16 all.

17 (PROCEEDINGS CONCLUDED AT 4:21 P.M.)

18

19

20

21

22

23

24

25

C E R T I F I C A T E

I, Alison M. Garagnani, Registered Merit Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case. And I further certify that the foregoing pages contain an accurate reproduction from taped proceedings had on that date, transcribed to the best of my ability.

I further certify that this transcript contains pages 1 through 235 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated Cape Girardeau, Missouri, this 18th day of September, 2013.

/s/Alison M. Garagnani
Alison M. Garagnani, CCR, CSR, RMR.
Official Court Reporter